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UNIVERSITY OF ALBERTA

RETHINKING THE STANDARD OF LIABILITY IN DEFAMATION: OF HISTORY, ACCIDENTS, AND THE CHARTER.

by

PATRICK C. TRELAWNY

A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES AND RESEARCH
IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF

MASTERS OF LAW

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submitted by Patrick C. Trelawny in partial fulfilment of the requirements for the degree of Masters of Law.

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Professor Rod MacLeod

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To those who provided the quiet support, the encouragement and most importantly the patience which was necessary to enable the completion of this project.

ABSTRACT

This thesis entails a review of the present *prima facie* standard of liability under the tort action of defamation in Canadian law and surrounding issues that have a bearing upon this subject. A historical and analytical approach is adopted. After exploring theoretical and general arguments that support strict liability for injury to reputation, specific doctrine is analysed to determine whether it is consistent with such theoretical underpinnings and to illustrate the practical effect of certain rules within the *prima facie* standard and the defences to the action. The historical common law origins of the action of libel and slander are then reviewed to illustrate several fundamental developments that have occurred and that have resulted in the broad impact of the present criterion. The author argues that uniform strict liability in defamatory law, contrary to conventional assumptions, is a relatively recent development and one that has not been analysed in detail by Canadian courts who have tended to adopt English precedent with little hesitancy. The specific policy basis and doctrinal development towards a more liberal standard in American law is examined and its applicability to the Candian context discussed. An argument is made for minimizing the impact of the strict standard of liability through restricting the scope of the action to imputations of defamatory fact enabling a greater allowance to be extended to clear expressions of opinion and through importing a recklessness criterion to the issue of identification of the plaintiff. The applicability of the Charter of Rights is then reviewed and suggestions made for reform of the law that is consistent with the principles embedded in this instrument.

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CHAPTER I

No other common law tort has been the subject of such considerable and continuous criticism as the action of defamation.[1] Opinions have ranged from the relatively mild "anomalous",[2] "a mass of technicalities",[3] and "an anachronism"[4] to the more pessimistic "absurd in theory",[5] "a terrible mess"[6] and "beyond redemption".[7] Surprisingly, these comments have been expressed not only by academic lawyers but by the judiciary as well. For the most part, they have one theme in common: the action is somehow flawed because it is the product of historical circumstance rather than any rational or coherent design and that it is in need of substantial revision.[8] As a result, reform studies have been commissioned within the last 20 years in several Commonwealth jurisdictions.[9] But despite this positive step towards change, no substantial revision has occurred.

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1 Throughout the course of this paper, the term "defamation" is used in reference to the traditional causes of action of libel and slander. Since the last remaining vestige of the questionable distinction between these causes, the matter of proof of damages, has been removed through legislation in a majority of Canadian common law jurisdictions (Alberta, Manitoba, New Brunswick, Newfoundland, and Prince Edward Island), this approach is appropriate.

2 Weiler, "Defamation, Enterprise Liability and Freedom of Speech", (1967) 17 U.Tor. L.J. 278 at 284 .

3 Diplock L.J. in *Boston v. W.S. Bagshaw & Sons*, [1966] 1 W.L.R. 1126 at 1135.

4 Plucknett, T., *A Concise History of the Common Law*, (5th ed., 1956) at p. 497.

5 Veeder, "The History and Theory of the Law of Defamation", (1903) 3 Col. L.R. 546 at 546.

6 Williams, J.S., *The Law of Libel and Slander in Canada*, (2nd. ed., 1988) at p. 2 approving the words of Lord Denning quoted in Mortimer, J., *In Character*, (1983), p.16.

7 Diplock L.J. in *Slim v. Daily Telegraph Ltd.*, [1968] 2 Q.B. 157 at 179 (C.A.). The Lord Justice did state that this was the reason why a further Reform Commission study should be commissioned.

8 Contrary views have been expressed but they are rare. See the comment of Richards J. in *Coates v. The Citizen et. al.* (1988), 44 C.C.L.T. 286 at 297 where he suggests that the modern action is the result of "dynamic adaptation to changing circumstances and customs."

9 "Report of the Committee on the Law of Defamation", United Kingdom, Cmnd. 7536 (1948) [the 'Porter Report or Committee']; "Report of the Committee on Defamation", United Kingdom, Cmnd. 5909 (1975) [the 'Faulks Committee or Report']; "Report of the Committee on Defamation", New Zealand, (1977); "Report of the Law Reform Commission on Defamation for New South Wales", Australia (1971); Law Reform Commission of British Columbia, *Report on Defamation* (1985).

The American experience aside, the general principles of the action remain substantially unaltered since their formulation in England in the 19th Century.[10] This is true notwithstanding almost two hundred years of profound development in our means and forms of communicating, a significantly increased reliance on specific types of communication for information, and the substantial evolution of social, ethical and political values affecting our approach to communicating. As one body of observers has acerbicly commented, "[defamation has] shown remarkable stamina in the teeth of centuries of acid criticism."[11] Since legislators are often the subject of allegations considered defamatory under current doctrine, the absence of political will to reform is not surprising.[12] A less severe regime of responsibility in the area would expose politicians to more public criticism. This, however, is an unsatisfactory apology. Communication, the general activity that the law governs, is of fundamental importance to all social, political and economic relations which, as a result, are necessarily affected by the present law.

It has been optimistically suggested by some that, with the new powers of review granted to the Canadian courts by the Constitution Act and the Charter of Rights and Freedoms,[13] responsibility for reform in this area has reverted to the judiciary[14] and the courts are now in a position to rewrite the law of defamation based directly on this constitutional instrument. This is ironic given that current doctrine, more so than in any other tort, is the result of 400 hundred years of precedent crystalizing upon precedent with little regard by the judiciary for underlying social interests and policy.[15] However despite such hopes, the broad comprehensive application of the Charter of Rights and Freedoms to the common law and a civil dispute between private litigants is

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10 Arguably, the last significant developments within the law were the recognition of fair comment as a distinct defence from privilege and the uniform application of liability without fault throughout the *prima facie* case.

11 "Report of the Committee on Privacy", United Kingdom (Cmnd. 5012), p.21, note 23.

12 In the words of Professor Weir,"those who make the law are unlikely to change the law." See Weir, *Casebook on Torts*.

13 *Constitution Act*, 1982, Sched. B of the *Canada Act 1982*, 1982, c.11 (U.K.).

14 Doody, "Freedom of the Press, The Canadian Charter of Rights and Freedoms, and A New Category of Qualified Privilege", (1983) 61 Can. Bar Rev. 124 and Madott, "Libel Law, Fiction, and the Charter", (1983) 21 Osg. Hall L. J. 741. Both authors presume that the Charter shall apply directly to the private law of defamation.

15 For example, the standard texts on the subject have a tendency to be a massive collation of precedents. For Canadian law, see Brown, *The Canadian Law of Defamation*, (1987) Vol.1 and 2; on English law, see *Gatley on Libel and Slander*, (8th ed. 1981) ed. by Philip Lewis.

uncertain.[16] Present indications of the actual extent of its application suggest that it may have a minimal effect on the private law of defamation.[17] Although it may be hoped that the the atmosphere bred by the Charter of Rights and Freedoms has created a healthier respect for freedom of expression which will spill over as an impetus to breathe new life into this area of private law,[18] the impact of this document may not prove to be the magical Rosetta stone that some have suggested it would be.

Consequently, it is timely and appropriate to take a closer look at the common law action itself, and in particular its history, to more fully understand the foundation and development of the law.[19] Currently, the most controversial matter in Canadian as well as other Commonwealth jurisdictions is the standard of liability, the basis upon which an individual will be held legally responsible for the harm caused by his communication. This measure, as it arises from the rules governing the constituent elements of the *prima facie* case that the plaintiff must make out to establish his cause of action and as affected by the various defences to the action, impacts upon most other contentious aspects of defamation doctrine.[20] It will be the aim of this paper to review this standard and to assess its adequacy in light of other issues that arise within the law of defamation. With an understanding of the background, of the broad impact and of the interests underlying this standard, a review will be made of what potential there is for the application of the Charter and an argument for the reform of the law.

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16 For a specific discussion on the application of the Charter, see Chapter VI.

17 For instance, see *Coates v. The Citizen et. al.* (1988), *supra.*, note 8, where Richard J. determined that the present strict standard of liability was "justifiable" pursuant to the restricting provision of S.1.

18 See *Retail, Wholesale, and Department Store Union, Local 580 et. al. v. Dolphin Delivery Ltd. et al.*, [1986] 2 S.C.R. 573 at 603 where MacIntyre J. stated on behalf of the Court that even if the Charter does not apply directly to the common law, common law principles should be interpreted and applied in a manner consistent with the fundamental principles embedded in the Charter.

19 This approach also is important because the primary issue in determining whether the Charter of Rights is applied to the private law of defamation is a question of whether defamatory doctrine, within the context of private law interests, policy and rationale, is inconsistent with the principles set out in the Charter.

20 For instance, when examining whether a special status should be granted to the media or whether the defence of qualified privilege should be broadened to all matters of public interest, the general standard of liability is an important that must be discussed.

The present standard has been described as strict,[21] which within context is accurate.[22] Even though the actions of libel and slander historically developed around the concept of malice, the intention of the defendant has come to be viewed under current doctrine as irrelevant to the *prima facie* case.[23] There is no requirement for the plaintiff to establish within his cause of action that the defendant generally intended to injure or harm the plaintiff.[24] Nor is it necessary to prove that the defendant specifically intended to publish his communication to a third party,[25] that his communication be either false or defamatory of the plaintiff,[26] or that it even refer to the plaintiff.[27] To make out a successful case, the plaintiff need only establish that the defendant was involved in publishing a statement and that statement, as a matter of objective fact, was defamatory of and did refer to the plaintiff. Significantly, the negligence or fault of the defendant, and his conduct in general, is not relevant to any of these issues. In short, the defendant will be held legally responsible under doctrine concerning the *prima facie* case for any defamatory consequences that arise from his act of communicating regardless of extenuating factors. In this perspective, the present standard clearly appears strict, in the legal sense of the word, as liability may be imposed under the cause of action without regard to intention or fault.

There is though one possible exception to the categorical application of this proposition under the issue of publication, that is whether the defendant intended that his communication be received by a third party. In *McNichol v. Grandy*,[28] the Supreme Court of Canada determined that, if the defendant did not intend and was not careless in his statement being published or communicated to others, no liability would

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21 See the blanket statement of Foisey J. in *Christie v. Geiger* (1984), 35 Alta. L.R. 316 at 323(Q.B.).

22 Insofar as strict liability means liability without fault, the description is accurate; but given the variety of defences to the action, strict liability cannot be said to mean absolute liability.

23 The phrase "presumption of intention" is often used in this regard. While it may appear dogmatic as intention is irrelevant to the *prima facie* case, it still holds some meaning because intention is relevant within the defences.

24 This principle finds its origins in the case of *Bromage v. Prosser* (1825), 4 B. & C. 1053, 107 E.R. 1051.

25 But see the discussion, *infra*.

26 *Capital & Counties Bank Ltd. v. Henty* (1882), 7 App. Cas. 741 (H.L.).

27 This rule was firmly established in the House of Lords decision in *Hulton (E) & Co. v. Jones*, [1910] A.C. 20.

28 [1931] S.C.R. 696.

issue. It can be argued that this rule provides a substantial basis for avoiding liability, an instance where negligence is an issue in relation to one of the constituent elements of the plaintiff's case, and that it undermines the assertion that liability is consistently strict throughout the constituent elements of the action. However, from a procedural point of view, 'accidental publication' does not actually effect the *prima facie* case as the onus is on the defendant to raise the issue after the plaintiff has established that publication to a third party did in fact occur.[29] With the burden of proving a lack of fault on the defendant, it in substance constitutes a defence to the action. Although the rule forms an exception to the broad proposition of liability without fault in connection with the issues that must be established under the cause of action, the initial presumption embodied in doctrine---that if publication to a third party occurred, the publication was intentional and negligent---is more consistent with a strict *prima facie* standard than characteristic of an exception to the rule.

As a result, it can be categorically asserted that strict liability is the governing principle within the *prima facie* case. The practical implications of such an unforgiving criteria for legal responsibility are severe. Liability may issue regardless of the defendant's motives for making the communication. A humorous[30] or harmless intention or an intention to refer to a fictitious person[31] are not relevant considerations. Because foreseeability of damage is not an issue, an accident---either a misprint or a transcription error or an unintended meaning---cannot be raised to excuse liability. A genuine belief in the truth of the statement or a reasonable assessment that the statement was accurate also will not assist the defendant. The defendant will also be held liable if he intended to refer to another party and was not aware or could not possibly have been aware of facts that tied his communication to the plaintiff.[32] Importantly, the necessity to the defendant of communicating, the benefit to others of having the defendant circulate the information contained in the communication or the importance of the

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29 *Ibid.*, Duff J. at p. 704.

30 For instance, see *Vander Zalm v. Times Publishers*, [1979] 2 W.W.R. 673 where a satirical cartoon, perhaps in bad taste, was interpreted literally and held to be defamatory when the intention was that of humorous lampooning.

31 *Hulton (E) & Co. v. Jones*, *supra.*, note 27.

32 The most dramatic example of this rule is the decision of the English Court of Appeal in *Cassidy v. Daily Mirror Newspapers Ltd.*, [1929] 2 K.B. 331 where an apparently innocuous statement concerning the two subjects of a photograph in the defendant newspaper was found by reference to be defamatory of a third party, the actual wife of one of the subjects.

subject matter carry no weight under current doctrine in determining whether the plaintiff's case has been made. No significance is attached to the circumstances surrounding the publication of a communication and little favor granted to the defendant's interest in communicating without the restraint of potential liability.

It is difficult to dispute that such an unremitting measure has a deleterious effect on communicative activity. It can be criticized on a number of bases. A party who elects to communicate is faced with the unpleasant consequence of having to assume all risk that some adverse consequence, whether foreseeable or not, might arise from his communication. When liability is imposed without regard to whether the consequences were intended or at least foreseeable, an argument can be made that the criterion for legal responsibility becomes separated from common ethical values concerning responsibility.[33] The defendant becomes the victim rather than the defamed when he is shouldered with both the legal blame and the financial burden of the plaintiff's loss despite what may be considered a lack of culpability. With liability issuing regardless of whether the defendant could possibly or ought to have foreseen the harmful consequences of his act, the opportunity to 'voluntarily' adhere to a rule of law is denied. An extension of this argument has been credibly advanced to suggest that such a standard lacks the minimum content of an achievable norm that is a requisite for a rule to be considered a rational and true 'rule of law'.[34]

Liability without fault also imposes upon an individual's entitlement to express himself and communicate freely. Whether or not this entitlement is considered or constitutes a 'right of free speech, expression or opinion',[35] a reasonable degree of open communication without the threat of legal sanction is a fundamental aspect of any social democracy. The present standard of liability clearly constitutes a restriction on

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33 For a quaint but dated review of the way in which strict responsibility and other doctrine parallel Christian values, see Harper, "Ethical Basis of the Law of Defamation", (1926-27) 31 Dickson L.R. 63.

34 See Weiler,"Defamation, Enterprise Liability and Freedom of Speech", (1967) 17 U.Tor. L.J. 278 at 313-316. Professor Weiler's argument is based on Professor H.L.A. Hart's jurisprudential theory and concept of the nature of law.

35 With the enactment of the *Charter of Rights and Freedoms*, this concept may gain a statutory footing.

this liberty.[36] Firstly, the basis is undermined when such a large field is occupied by those communications which are or potentially may be considered defamatory. This is due to both the broad definition of what is considered defamatory under current doctrine as well as the fact that the only issue phrased in the *prima facie* case involves determining whether an act of defamation has occurred. Secondly, strict liability impacts with a 'chilling effect' and deters open communication through the threat that the communicator will be subject to a *post facto* sanction unrelated to his motivations or understanding.[37] Parties with potentially important and valuable information to circulate may be hesitant to publish if to do so might expose them to the possibility of a lawsuit or a damage judgment. When this effect occurs in connection with communication on a matter of public concern, it becomes most objectionable as uninhibited discourse---the dissemination and discussion of ideas, opinions and views---is vital to our social order.

These arguments however are not limited to the realm of abstract individual rights, public law and freedom of speech, but are just as applicable on a practical level to the sphere of personal relations and commercial affairs. Discussion of local matters, social relations, culture and other topics, whether deemed public or private, are necessarily affected. Those entities who must communicate with third parties as an incidental but necessary part of their business or who are in the business of communication clearly must alter their operations due to the strict standard of liability. The constant financial risk of being subjected to a judgment for damages for publishing what was thought to be a true statement[38] obviously effects the ability to function efficiently. It is a very real possibility that the content of communication becomes muted, as well as the willingness to communicate limited, when a publication may result in costly litigation. While the media may have to deal with this problem as a cost of doing business, other types of commercial enterprises can be unreasonably distracted

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36 It is often suggested that an individual always has freedom of free speech as long as it is exercised within the parameters of the present law. This clearly is a platitude if the right has no inherent substance because of the narrow limits imposed by the law.

37 This interpretation has formed the policy basis of the development of doctrine in the United States. See the decision of Justice Brennan in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). However, this view of the effect of the law was rejected by the Nova Scotia Supreme Court (Trial Division) in *Coates v. The Citizen et. al.* (1988), 44 C.C.L.T. 286.

38 A reasonable belief that a statement was true as well as being irrelevant to the *prima facie* case also constitutes no defence.

from their primary activity. If communication with third parties is an essential part of ordinary business affairs then it is inevitable that the present standard will adversely effect that business be the context finance, the rendering of professional services, trade, sales or other commercial enterprises.[39]

In the face of such arguments, there must be a strong justification for this standard and a clear rationalization for making those who engage in communicating carry the burden in most instances of loss arising from the activity. Conventional arguments in support of the present law suggest that the severity of the *prima facie* standard is adequately counterbalanced by the range of substantive defences upon which the defendant can rely. Justification, qualified privilege, absolute privilege, fair comment and innocent dissemination all constitute instances where the plaintiff, even if he has proven his case, will still not be compensated for his alleged injury and the defendant will be absolved. In essence, these defences form grounds whereby either limited defamation is deemed acceptable or what may appear to be a defamatory statement is considered not defamatory[40] because of the greater social purpose served by the defence. The collective rationale for this result is generally perceived to be the accommodation of the important societal interest in communication and the free exchange of information. While the defences to a greater or lesser extent do provide limited bases for avoiding liability, it is important to note that, because of the strict *prima facie* standard, they form the only grounds upon which a legal sanction will not be imposed for 'causing' defamatory harm. It is not suprising then that the question of liability is most often aired within this realm, and it is apparent that the issue of whether they satisfactorily perform this vital function is of fundamental importance[41] in assessing the impact of the present *prima facie* standard of liability.

The specific rules relating to each defence are complicated. It is interesting to note that semblances of negligence and intention, alternative general principles to strict

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39 Credit reporting agencies are the most obvious non-media business directly affected by defamatory law. However, stock brokers, advertising agencies, lawyers, doctors can be as easily affected and must alter the manner in which they do business.

40 This latter result arguably arises when the defences of justification and fair comment are raised: is a true statement or a clear opinion actually defamatory or a type of communication that is not defamatory. On justification, see the discussion in Chapter II at page 38.

41 Dickson J. in *Cherneskey v. Armadale Publishers Ltd.* (1978), 90 D.L.R. (3rd) 321 at 342, [1979] 1 S.C.R. 1067 at 1095.

liability, are found in this realm. When fair comment and qualified privilege are raised, the honesty or reasonableness of the belief of the defendant in the truth or accuracy of his statement and his general intention or dominant motive in making the statement appear and are relevant to the general issue of liability.[42] Hence the actual knowledge of the defendant in light of the circumstances surrounding the initial publication, his conduct in assessing the accuracy of the content of his statement, and his reasons for communicating will be under review and be a factor in determining whether liability will be imposed. This is in distinct contrast to the *prima facie* case. Significantly, these elements do not form the primary basis of these defences. Not only are good motives and a reasonable belief a requirement to avoid liability, other factors relating to the circumstances of the publication must be established for the defendant to succeed. These factors are phrased as objective elements. In the case of fair comment, a truthful basis to the statement and that the subject was a matter of public issue must be established whereas under qualified privilege, a legally prescribed duty or interest in making the statement. These are issues separate and apart from the defendant's understanding and knowledge at the time of communicating. As a result, it can be argued that the effective application of both of these defences is in practice limited.[43]

On the other hand, the defences of absolute privilege and justification can be criticized as being inequitable and inconsistent in application due, not to the limited relevance of intention or recklessness, but to the fact that intention and recklessness are irrelevant to the success of these defences. No matter how willful, malevolent and destructive, the defendant may still be successful in relying on both of these defences to avoid legal responsibility as they are based on objective fact, either the setting in which the communication was published or the truthful content of the communication, without regard to the the reasons for publishing the statement. This obviously creates the potential for abuse which is difficult to justify given that the general aim of the action is commonly perceived to be the protection of an individual's reputation from unwarranted attack. Although accepted principles have developed to justify the specific rules governing both these defences and fair comment and qualified privilege, the

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42 See the discussion in Chapter II at pages 41-46.

43 The inherent complexity created by the sequence of rules also makes it difficult for both the plaintiff and the defendant to predict whether the defence applies to the immediate facts, forces both parties to take calculated risks in litigation strategy, and arguably limits the benefit of the defences.

underlying rationale for the relevance and irrelevance of the defendant's conduct under all of the substantive defences can be questioned. The net effect may be that they at most exempt liability in a haphazard fashion as opposed to truly accommodating communication and balancing the strict *prima facie* standard of liability. To function properly, they must encourage communication in a parallel but opposite manner to the way in which the *prima facie* standard deters communication. Because this matter is of paramount importance to our subject, it will have to be analyzed in greater depth at a subsequent point. Suffice it to say at this time that unless the defences do satisfactorily perform the vital function of allowing and promoting, when warranted, the free flow of socially valuable information without the impediment of liability then the present standard may be unjustifiably strict and onerous.

Another argument that can be raised to refute the extent to which this standard negatively impacts upon speech arises from the type of communication for which liability will be imposed. If the ambit of what is considered to be defamatory is relatively narrow and precise, the consequences of the present criterion may not be as severe as some suggest. Liability without proof of fault or intention for publishing a statement that is defamatory and does refer to the plaintiff may to a certain extent be justified if a party can reasonably anticipate prior to acting what may or may not be considered defamatory, and knows when communicating that he is transmitting information that may potentially be defamatory. Caution can then be exercised when entering into this area and the potential for harm minimized. This however is not the case under present doctrine. Firstly, as rules governing the meaning of the communication are not based on the intention of the defendant or foreseeability but what a hypothetical audience would interpret the communication to mean,[44] an entirely unpredictable meaning or reference may be attributed to the defendant's words. Regardless of the steps taken to ensure accuracy, it is still possible that the defendant's act will result in liability.[45] As a result, an individual can never be absolutely sure that his communication will not be considered defamatory which means that there will always be a certain hesitancy to communicate openly.

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44 See Chapter II, page 28.

45 Although research and review to ensure factual accuracy may be encouraged by the strict standard, liability without any regard to fault can also lead to individuals taking the calculated risk of saving financial resources in the short term and pooling funds to cover a future damage award. This possibility is clearly not an efficacious result.

Secondly, since general damages are presumed, the exact nature of a reputation, the specific interest protected by the law, is rarely articulated and somewhat vague. Indeed, due to this presumption the criterion for determining what constitutes a defamatory statement becomes the primary benchmark for liability and this issue, given the broad definition of what constitutes a defamatory statement, is difficult to predict. As a result, a penumbra of uncertainty surrounds the defamatory standard. Any statement expressly concerning another individual or a group, if capable of being interpreted negatively, may be considered defamatory and result in liability unless specifically proved to be true. In the same manner, the converse also applies: any negative statement, if capable of being interpreted as referring to an individual or small group, may also be considered defamatory. Most criticism by its inherent nature is negative[46] which leads to the conclusion that much criticism may potentially be actionable, a result which obviously affects all areas where critical thought is important to a thorough review of an important subject. As a result, the type of comment which may be considered to be defamatory of the plaintiff's reputation and the scope of the action, rather than minimizing the negative effect of the present standard of liability, may cause that standard to have a broader impact on communicative activity than at first may appear.

The other most common reasoning raised to justify the present strict level of legal responsibility is the interest protected by the action. Reputation is a distinct and valuable personal interest.[47] A defamatory statement can cause both extreme psychological or emotional damage as well as the impairment of social relations and economic loss. A strict standard of liability both symbolizes the high value that the law attaches to this interest and ensures that an injured party will be compensated for his loss in a great number of instances. In addition, given that the injury is difficult to quantify in monetary terms and may also be insidious and irreversible in effect,[48] strict liability may be warranted to ensure that not only will an aggrieved individual receive

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46 Klar, "Developments in Tort Law", (1980) 1 S. C. Law Rev. 312 at 315.

47 See the comments of Lord Hailsham in *Cassel & Co. Ltd. v. Broome*, [1972] A.C. 1027 at 1070, [1972] 1 All E.R. 801 at 823.

48 See Note, (1956) 69 Harv. L.R. at 902 where the commentator has described a defamatory comment as "frequently ineradicable and sinister in effect".

some form of compensation but also to ensure that those engaged in communicating will be deterred from publishing potentially defamatory material and will govern their affairs with a high degree of care so that the likelihood of a defamatory comment arising is decreased.[49] While this argument does carry a certain amount of weight, it also must be noted that specific rules exist under the present law which ameliorate, if not erase, the extent and harmful nature of this type of injury.

General damages are presumed so the plaintiff is not faced with the problem of establishing damage to an intangible interest. Every republication of a defamatory allegation constitutes a separate cause of action[50] which ensures that, in theory if not in practice, compensation is available to the plaintiff for each separate incident of republication. As well, repetition is a factor to be taken into account in assessing damages,[51] so that the plaintiff should be compensated for the full extent of the harm caused by the defamatory statement. The declaratory effect of a publicized award of damages also, to a certain extent, vindicates and reverses the pervasive effect of the initial defamatory utterance. The inadequacy of a monetary damage award as an instrument of restitution is not a problem specific to defamation but to all personal injury actions and other remedies within the civil law. The general argument, that the nature of the interest protected warrants a strict standard of liability, to a certain extent is self-justifying in that it is only descriptive of the present law unless other more cogent reasons can be found to support such a valuation. Whereas it may be that a higher value should be placed on physical interests such as the person and reputation, which are personal, unique and irreplaceable[52], this proposition must be viewed in the light of its effect on the other social interests and activities with which the action is concerned.

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49 For a fictional account of procedures adopted by a publishing house to minimize defamatory liability, see the narrator's view of the Department of Factual Verification in Jay McInerney's *Bright Lights, Big City* (1984).

50 *Duncan & Neill on Defamation*, (2nd ed., 1983), p.35. This principle has been somewhat eroded by the 'single publication rule' but this principle is procedural in nature, relating to limitation periods and the origins of the cause. The extent of publication is still a relevant matter in assessing general damages.

51 Repetition of a defamatory remark may form the basis for an award of punitive damages. See the cases cited in Brown, *The Law of Defamation in Canada* , (1987) Vol.1 at p.1067, note 450.

52 It must be noted that strict liability is not the governing standard in other torts protecting personal interests such as assault, battery or negligence.

If a single adequate explanation for the strict form of *prima facie* liability cannot be found within the balance of legal rules and existing framework of the action, a broader perspective, focusing on the social interests underlying the action and on general tort theory, may be more fruitful in finding support for this standard. Defamatory harm obviously arises from communicative activity.[53] The present law, through the imposition of liability without intention or fault, attaches an extremely low value to this activity especially when contrasted with the high degree of protection afforded reputation. If this form of behavior is inherently dangerous or extra-hazardous and of limited social value, a firm deterrent and strong educational message through strict liability may be warranted. Extraordinary care ought then to be exercised in communicating and, as a result, the possibility of harm arising minimized. However, the applicability of this rationale to defamation is debatable. Communication is an ordinary process common to all other social activity. In fact, it is an essential and invaluable aspect of all social, political and economic interaction. Unlike the instrument of harm governed by other strict liability torts, such as dangerous animals, non-natural substances on property or defectively dangerous products, communication is not specific to a particular area of human conduct and unquestionably is of extreme social value.

It may be that defamatory harm can be considered to arise not just from communications in general but from statements that contain information reflecting upon the reputation of another person. If so, this specific type of communication may be considered abnormally dangerous requiring an extraordinary standard of care. Those who circulate information concerning other individuals can be seen as implicitly assuming the greater risk of the possibility that defamatory harm will result and the consequences of the present strict standard of liability. This distinction though between types of communication loses some plausibility when specific rules under present doctrine are reviewed. Given the broad ambit of what constitutes a defamatory comment, what can be interpreted as being a reference to the plaintiff and rules governing innuendo,[54] a defamatory communication does not necessarily entail a

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53 Any form of communicative gesture can give rise to the cause of action and words do not necessarily have to be spoken or published. See for instance *Varner v. Morton* (1919), 53 N.S.R. 180 (C.A.) where charivari, the clashing of pots, was held to be defamatory. Or 'pantomine': *Bennet v. Norban*, 396 Pa. 94, 151 A. 2d. 476 (1959).

54 See Chapter II at page 28.

statement 'aimed' at another. Because the intention and understanding of the communicator is separated from the interpretation placed upon the communication, it is possible that a publication which on its face appears to be a plain statement of fact unconnected to any individual can be interpreted as referring in a defamatory manner to an individual. As a result, in theory a party engaging in ordinary communication cannot be entirely sure that his statement will not be deemed defamatory. Although there may be a certain amount of general truth in this distinction, and a party contemplating the communication of matter that obviously reflects upon another individual may be deemed to have been aware of the risk that he is running, the argument weakens when scrutinized against the specific doctrine it attempts to support, especially when discussing the effect the standard has on general activity.

It is perhaps more accurate to say that the dangerous and harmful nature of any communication lies in the possibility that false information will be circulated. If reputation is the primary interest protected under the law and an individual's reputation is the opinion of him formed by others, then it is the false information which provides the basis of the opinion that affects reputation. Under present doctrine, a false statement when it touches upon another's reputation is synonymous with a defamatory communication.[55] In this respect, the anomalous nature of the present strict *prima facie* standard of liability in defamation becomes even more apparent when it is viewed in the context of other communicative torts. Misrepresentation, either based on fraud or negligence, and injurious falsehood like defamation are founded on the publication of a false statement made by the defendant to another party.[56] Most often the statement will contain a reference to some other object, state of affairs, or course of events. Notwithstanding this common basis, those other actions require proof of a culpable course of conduct by the defendant and actual damage before a remedy will be granted. Liability is premised on the defendant either having recklessly or negligently communicated a false statement with either the knowledge or the intention that the plaintiff would rely on it and be injured.[57] This constitutes a clear failure to adhere to a

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55 Because of the existence of the defences of truth and fair comment, not every false and harmful statement that affects reputation is actionable.

56 Of course, in negligent and fraudulent misrepresentation, the communication is most often directly made or transmitted through to the plaintiff. However, this is not always the case.

57 On fraudulent misrepresentation, see *Derry v. Peek* (1889), 14 App. Cas. 337, 58 L.J.Ch. 864; on injurious falsehood, see *Serville v. Constance*, [1954] 1 W.L.R. 487 at 490 (intentional), but also see

standard based on reasonable care and the defendant's understanding at the time of the act. This measure provides a far greater allowance for general communication by only granting a cause of action in serious instances of misconduct ensuring that communication can flow concerning right and entitlement to property or within professional or commercial business relations without the impediment created by a strict standard of liability.

The simple question arises as to why such an extraordinary duty of care and responsibility is imposed for defamatory communications in contrast to these other torts governing the same basic activity. As has been noted, a 'defamatory act' often, although not always, entails a statement aimed at the silhouette or character of another in contrast to a general statement of fact. However, a misrepresentation can as easily contain information reflecting upon another person as a defamatory statement can arise from a bald statement of fact apparently unrelated to any person. Therefore it would appear that it is the consequence, that the communication causes harm to reputation and not only economic loss, that is the primary factor that separates the bases of these causes of action and warrants the higher standard of care in defamation. The gravity of the harm caused to reputation may be considered more significant than the fungible economic loss caused by misrepresentations and slander of title. As we have previously suggested though, this consideration alone should not be the determining factor as to what level of responsibility is imposed. Communications containing information reflecting on others often contain more socially valuable information than would a mere statement of fact. It is the type of communication involved, the tendency or potential for it to contain important information, or the social benefit and necessity of allowing individuals to communicate freely in certain situations which should be the measure of the value which should be attached. The incidental subject matter or consequences of the communication alone should not be the overriding and dominant factor in determining the level of responsibility to be imposed.

If defamation cannot be substantially distinguished from other communicative torts, an argument can be made for bringing the present standard of liability into line with these other civil actions and developing rules base on criteria of reasonable care in

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Joyce v. Motor Surveys, [1948] Ch. 252 (without just cause); on negligent misrepresentation, see *Hedley Byrne v. Heller* , [1964] A.C. 465.

the *prima facie* case. However, comparing and contrasting the action against other communicative torts is not in of itself a sound basis upon which to ground an argument. Each separate cause of action is open to its own criticism. Although this exercise may illustrate what appears to be an uneven and inconsistent treatment within the law, the particular subject matter and interests at issue under each cause of action should be considered separately. In this respect, one factor that does distinguish defamation from these other communicative torts is that it can be considered a cause of action that is specific to a particular industry. Defamatory harm often arises from the activity of the media, those parties engaged in the business of communicating. The role and function of this social institution, to report and circulate information, necessarily creates the potential for accidental, negligent or intentional incidences of defamation.

If defamatory incidents most often arise from the actions of those in the business of communication and this harm is considered to be an unavoidable consequence of that business then it may be logical that all risk of loss be borne by the defendant through strict liability.[58] Media operations, being engaged in an activity for profit, are much better placed to bear the cost that arises from the activity. They are in a position to adjust and adapt their financial affairs to absorb and incorporate the loss into the cost of their product through pricing or insurance.[59] With the knowledge that this cost is an unavoidable requirement of communicating or doing business, resources can be structured so that the loss can eventually be distributed through the market cost of the product to the end-user and consumer. It is then placed with the ultimate beneficiary of the activity. In this manner, the impact of the incident is minimized and the loss spread through to a broader base.[60]

While theoretically appealing, this argument assumes that the defendant will distribute the cost through to those who benefit from the defendant's activity. In the increasingly competitive media environment, this may not be the case. Since the price

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58 For a much more thorough and excellent analysis of the theory of enterprise liability and its applicability to defamatory doctrine, see Weiler, "Defamation, Enterprise Liability and Freedom of Speech", (1967) 17 U.Tor. L.J. 278.

59 As Professor Weiler points out, *ibid.*, a theory based on insurance to spread the impact of the loss does nothing to deter and minimize the frequency of defamatory incidences.

60 See Professor Weiler's critique and conclusion of social cost accounting *ibid.*, at page 306-10. In his view, the cost is merely shifted and not removed and the resulting placement on the enterprise is no more rationale than the present law.

of the product may be crucial to that product's success and continued survival, a party may avoiding publishing much valuable material that has the potential, even the slight potential, of being defamatory rather than incurring an increase in product cost. This would only lead to weak, ineffectual and evasive reporting, obviously a detrimental result. Or alternatively, those parties who opted to circulate such information may face bankruptcy if they choose to fulfill what may be considered their social duty, yet at the same time attempt to be cost-competitive. In addition, it also assumes that the defendant is in a position to order his affairs so that the economic loss does not have a severe impact on his business. Media enterprises may be the most common 'type' of defendant but private individuals frequently find themselves subject to a defamation lawsuit to whom such a rationale would be inapplicable. It is unreasonable and perhaps absurd to expect private individuals to obtain and carry insurance, in the same manner that they would do for driving an automobile, for such an ordinary and fundamental activity as communicating or alternatively have them forebear from publishing statements reflecting upon another person. In a sense it would be punitive for individuals to find themselves subject to a principle and standard of legal responsibility that finds its rationale rooted in the context of an industry defendant.

Although the argument for enterprise liability may be applicable to other activities from which tortious harm arises which are more specific to a particular industry, unintended consequences appear when viewed as a governing rationale for the standard of liability in defamation. Furthermore, the theory does not account for distinctions that are made under current doctrine creating a different standard of liability for specific classes of defendants.[61] Nor does it take into account the variety of defences under which liability is lifted from the defendant and the plaintiff must bear his own loss. The aim of enterprise liability, the minimization of the social cost of a defamatory incident and the more rational distribution of loss arising from defamation, may contain merit but the theory falls short of providing a coherent explanation for current defamation doctrine and the present measure for liability.

Perhaps the primary benefit of the present strict standard of liability lies in the fact that most 'victims' of defamatory harm will receive restitution in the form of

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61 For instance, innocent disseminators and those who publish defamatory statements accidently as opposed to intentionally.

monetary compensation for loss suffered and, significantly, vindication of their reputation through the declaratory effect of a judgment. This latter result is an important part of the defamation remedy.[62] It is important to note that it arises due to the way in which the action is structured. With strict liability under the *prima facie* case, the simple question initially put to issue is whether or not the plaintiff has been defamed. No extenuating factors cloud this determination as it is placed in the forefront of the action with the matter of justification and relative culpability deferred to a secondary role within the defences. Therefore, even if a defence is granted and the defendant excused from carrying the cost of the harm, there will still be a decision to the effect that the plaintiff has been defamed, and hence a limited vindication.[63] In addition, excepting instances when absolute privilege and accidental publication is raised, a decision on the truth or falsity of a statement may often be explicit or implicit in a judgment even when a defence is raised. Whether intended or not, the action and the presumption of falsity within the *prima facie* case acts so as to bring a legal determination of truth to matters that may be of public controversy. When speaking in conventional terms of compensation and harm, this aspect of the action is often overlooked. The cause of action does act as a means by which broader social or historical questions can be put to legal proof.[64] While this may be an imperfect forum for this procedure, it is clear that strict liability makes this incidental aspect of the action possible.

Strict liability also furthers and is essential to some other functions of the defamation action. More so than many other torts, defamation still acts as a significant instrument for diverting private disputes into an institutional channel and maintaining the public order. Although this can be considered to be the principal domain of the criminal law, liability without fault obviously opens up the remedy and makes it more accessible for this purpose. The standard also provides a substantial amount of

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62 Professor Fleming has suggested that this should be the primary aim and purpose of bringing an action for all plaintiffs: see "Retraction and Reply: Alternative Remedies for Defamation", (1978) 12 U.B.C. Law Rev. 15. This may be overly optimistic given that the prohibitive cost of bringing a matter to trial only leads to the hope that some of this expense can be recovered through a damage award. Others have suggested that gold-digging motives are more often present: see Merry, "Motives behind the Mask" 1978, Dalhousie University, Graduating Thesis.

63 This vindication is defeated when the defendant is successful in establishing truth or justification.

64 For instance *Cassel & Co. Ltd. v. Broome*, [1972] A.C. 1027, [1972] 1 All E.R. 801. For a fictional account of this aspect of the action, see Leon Uris's *QB VII*.

protection for privacy.[65] While this interest is imperfectly protected under present tort and statute law, the threat of an action of defamation can in some instances be used to achieve this end. With the wide ambit of actionability and the defendant's intention irrelevant to liability, a defamation action will often stop idle gossip or rumors and unwarranted public discussion of private affairs. While these results tend to be incidental to the primary concerns of the action, they must not be overlooked in determining whether the present standard of liability is satisfactory.

It is the multiple interests and the complexity of the action that makes the development of consistent but flexible rules and principles problematic.[66] In assessing the relative merit of any single rule, the diverse nature of the action---the range of different fact patterns, different 'types' of defendants, different intersecting interests and different functions that the action purports to acheive---must always be considered. The role of the press and media institutions, whether they should have a special status because of their important social responsibility in distributing information or a higher level of responsibility because of the potential harm caused through their broad audience, must be balanced against a respect for privacy and a recognition of the value of reputation and the honor and dignity associated with that interest. At the same time, the relative importance that is attached to maintaining full and open debate on matters of government, at all levels, affects these issues as does the question whether full and open debate should be extended to all matters of public concern. If this principle is to be implemented, what effect will it have on the importance of keeping certain channels of unhindered communication open between private parties? Also, will it change our present approach to and proscription against the circulation of false facts and the 'malicious' circulation of any unverifiable information? Any reform of the present law, if deemed necessary, must take into account these competing interests and policy issues, and attempt to reconcile these matters into a comprehensive yet administrable structure.

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65 Perhaps the best illustration of the defamatory cause being used in this manner is *Tolley v. J.S. Fry & Sons*, [1930] 1 K.B. 467 (C.A.), rev'd [1931] A.C. 333 (H.L.).

66 This point is well illustrated by the evolution in the United Sates of what is essentially two sub-sets of defamatory law, one applicable to "private" plaintiffs and one to "public" plaintiffs, to accommodate the varied interests at issue.

Conventionally, the present law and standard of liability is often defended on the basis that it adequately addresses the competing interests with which the action is concerned. Specific rules are often conceived as being focused upon the two primary 'legal rights' in issue, the reputation of the plaintiff and the defendant's entitlement to free speech. On the one hand, the plaintiff's 'right' to an unsullied reputation and to be free from unwarranted communicative attack should be respected while on the other hand, the defendant has a 'right' to freely express himself and his opinions, to communicate and receive information, and to be free to do so in an unrestricted and open environment. It is commonly suggested that the network of rules that have evolved within the action are the result of the balancing of these particular 'rights'[67] and that the present standard of liability, coupled with the defences to the action, constitute the correct neutral balance between too much free speech and too protective a standard.[68] Within this orthodox perspective, the issue of altering the present standard of liability which will affect the interplay between these contrapuntal rights becomes a question of competing values: is more weight to be attached to the public interest in free expression or to the private interest in protection of reputation?[69]

This view rests on the assumption that a fundamental conflict underlies the action and that these interests, the activity of speech and the value of reputation are necessarily opposed. The plaintiff's interest in protection of reputation is directly in conflict with the defendant's and society's general interest in freedom of speech and free communication.[70] In this perspective, the conclusion that will always be reached is that to grant greater accommodation to the activity of communication and create freer

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67 See Cane, "Justice and Justifications for Tort Liability", (1982) Oxf. Journ. of Leg. Stud. 30 where the author views defamation as falling within a 'rights-based conception' of justice whereby culpability is irrelevant to liability which is based on the invasion of the plaintiff's right although the defendant may answer by asserting a right of his own.

68 This was the conclusion reached by Richards J. in *Coates v. The Citizen et. al.* (1988) 44 C.C.L.T. 286. Dickson J. in *Cherneskey v. Armadale Publishers Ltd.* (1978), 90 D.L.R. (3rd) 321 at 342, [1979] 1 S.C.R. 1067 at 1095, suggests that the aim of the law must be to maintain this balance.

69 This apposite frame of reference can be viewed as little more than a conflict of competing ideologies, the libertarian or liberal preference for uninhibited freedoms versus the conservative inclination for the status quo and preservation of property. However, such a perspective does not take into account the rationale upon which the complicated network of specific rules within the action have developed. It is the adequacy of these specific justifications for the present standard of liability, which are based on common but not ideosyncratic values, that must ultimately be the criteria for reform rather than the championing of a particular ideology.

70 For instance, see the Report of the Committee on Defamation, United Kingdom Cmnd. 5909, p.4.

speech would result in a diminishment of the protection afforded reputation while to place a greater value on and to provide greater protection to the interest of reputation would result in a stricter standard of liability and less free communication. This conception though, that reputation and free communication are necessarily opposed, is narrow and misleading. Although true in the context of litigation,[71] it is not true when the respective interests and activities of the parties are looked at in a larger social context. Speech and communication may be the sole cause of damage to reputation but at the same time they also form the basis for the existence of reputation: the status, esteem or reputation of an individual in society is the result of and arises from the circulation of information. This intangible quality is the product of the consensus formed by others, not just from personal observation, but increasingly from communications received on the activities, conduct and statements of another individual.

As a result, there must be an acceptable amount of free and open communication for reputation to be considered to have an inherent and true value. An undue restriction on speech underscores the very value of reputation.[72] If we must read communications with the proviso that they have been shaped by a restrictive defamation law then our collective understanding of an individual's reputation will always be formed with a similar proviso: what we have heard and know is less than forthright. Therefore, in order to better respect the broader interests of both the plaintiff and the defendant, it is more appropriate to perceive the aim of the action to be the maximization of free speech while retaining adequate protection of reputation.[73] This is a subtly different calculus to that which has traditionally been adopted as the governing principle in the action.

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71 Due to the nature of the adversarial process, the plaintiff and the defendant and their respective interests must represent apposite points of reference.

72 See the judgment of Erle C.J. in *Whitely v. Adam* (1863), 15 C.B.(N.S.) 392 at 418, 143 E.R. 838 at 848 where the Chief Justice stated: "If every word which is to the discredit of another is to be made the ground of an action, cautious persons will take care that all their words are words of praise only, and will cease to obey the dictates of truth."

73 This argument is reflected in the speech of Lord Alvanley C.J. in rationalizing the early doctrine of privilege in *Rogers v. Clifton* (1803), 3 Bos. & Pul. 587 at 591, 127 E.R. 317 at 319:

> If it were to be understood, that whenever a master gives a bad character [reference] to a servant who has quitted his service, he may be forced by the servant, in justification of such his conduct as a master, to prove the particulars which he has stated respecting the servant, it would be impossible for any master so understanding the law (at least with regard to his own safety), to give any character but the most

It will be the aim of this paper to review and re-evaluate present doctrine to determine whether it comes close to actually achieving this goal. Two approaches will be adopted. Firstly, an analysis of certain specific rules relevant to the present *prima facie* standard of liability will be undertaken to determine both the underlying rationale and the practical consequences of the application of these rules. In turn the defences will be examined to ascertain limitations on their application and the apparent policy underlying these restrictions on liability. Secondly, the historical development of the basis of the cause of action and the standard of liability in the *prima facie* case will be reviewed in order to gain a better understanding of the background to present doctrine. This historical perspective is appropriate not only because certain rules find their only or most rational explanation in their history,[74] but also because there is a tendency within the judiciary to see the action of defamation "as firmly rooted in its historical origin and not as open to development and rationalization that is acceptable elsewhere in the common law."[75] The indefensible comment of Bray J. in the case of *Hellwig v. Mitchell* illustrates this approach: "[the action] is not a question of principle, but of judge-made law."[76] This approach, exacerbated by the habit of the judiciary to overly rely on precedent and authority[77] with little scrutiny or analysis, has led to a marked resistance to development within the law and a failure to stay abreast of changing values, mores and attitudes within our contemporary society.

It will be argued through the course of this paper that several misunderstandings concerning the history of the law have effected the subsequent development of the action. Uniform strict liability is not historically entrenched but is a fairly recent development. Combined with the emergence of an exceptionally broad approach to

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favourable to a servant, and consequently impossible for a servant, not entitled to the most favourable character, to obtain a new place.

It may be added that any reference that was provided, having to be so favorable, may be less than honest and accurate.

74 The most obvious example of this phenomenom is the debate concerning the distinction between libel and slander. See Kaye, "Libel and Slander--Two Torts or One?" (1975) 91 L.Q.R. 524.

75 *Gatley on Libel and Slander*, (8th ed., 1981), para.14.

76 [1910] 1 K.B. 609 at 613.

77 For an example of this phenomenon, see the majority judgment of Ritchie J. (Laskin C.J., Pigeon J., Pratte J. concurring) in *Cherneskey v. Armadale Publishers Ltd.* (1978), *supra.*, note 66 at 1081-1091 where he spends the greater part of his judgment reviewing precedents to the neglect of the greater issues before him.

what constitutes a defamatory statement, it has resulted in the present standard of liability having an unreasonably wide and negative impact on communications in general. With a clearer understanding of this history, it is hoped less resistance will be met when discussing potential reform within the law. With this background in place and with reference to American developments and the potential application of principles arising from the *Charter of Rights*, an argument will be made for potential reform that may minimize some of the adverse results of the present strict standard of liability and problems that plague the law.

CHAPTER II

Due to the strict *prima facie* standard of liability and the presumption that a statement considered defamatory is both false and causes damage, there is a relatively low threshold under current doctrine in establishing a cause of action.[78] To make a case, the plaintiff must only establish that the defendant was involved in the publication of a communication to a third party which contained a defamatory imputation and referred to the plaintiff. As the party from whom the publication issued directly is most often the principal defendant, responsibility for publication is only contested in the extraordinary case.[79] The other two requirements, reference to the plaintiff and the defamatory "sting", are both phrased as questions of objective fact: was the publication defamatory and did it refer to the plaintiff? As a result of the irrelevance of the intention and fault of the defendant, the plaintiff is not faced with the complexity inherent in establishing at the time of publication a requisite state of mind of the defendant or his failure to adhere to an objective standard. But at the same time, the cause of action is proven regardless of the circumstances surrounding the publication and any extenuating factors.[80] The practical implications of this burden is that a large number of communications can be considered *prima facie* actionable before the question of the applicability of a defence is raised. This structure creates the potential for a high number of lawsuits.[81]

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78 See the comment of Mr. Justice Dickson of the Supreme Court of Canada in *Cherneskey v. Armadale Publishers Ltd.*(1978), 90 D.L.R.(3d) 321 at 342, [1979] S.C.R. 1067 at 1095.

79 That presumptions that arise concerning the production of evidence and establishing the fact of publication indicate that the issue is often self-evident and not contested, especially in the case of libel. See Brown, *The Canadian Law of Defamation*, (1987) Vol. 2, p.935-936.

80 The plaintiff may inadvertently open up the issue of the circumstances of publication through leading evidence to establish the defamatory meaning and the existence of innuendo thereby allowing the defendant to lead contrary evidence. However, the defendant is restricted from introducing such evidence unless the matter is specifically placed in issue: see Porter and Potts, *Canadian Libel Practice*, (1986) p. 175.

81 An individual is less likely to bring suit over a statement if he is uncertain as to whether he has a cause of action in distinction to whether the application of a defence firstly applies and secondly will be

While this result in and of itself cannot necessarily be criticized if it serves a legitimate goal, it does result in the occupation of considerable resources, both public and private, to prosecute, defend and adjudicate upon defamation claims. For this reason amongst others, legislation has been enacted in all Canadian jurisdictions[82] providing for the offering of an apology and, in the case of a newspaper defendant, retraction. This possible course of action provides both the plaintiff and the defendant with a means by which their dispute can be resolved without the necessity of litigation and the attendant cost and delay. It also minimizes the period of time that lapses between the original harm and the time when steps can be taken to reverse that harm. While such possible resolution is obviously salutary, it is important to note though that an apology or a retraction is still a remedial option and only comes into issue subsequent to the defamatory incident, that is if an incident has occurred that is or can be potentially considered "defamatory" under present doctrine. Obviously the defendant's election to utilize this means, either as part of a comprehensive settlement or to mitigate damages, and the plaintiff's willingness to accept will be dependent upon an assessment of potential liability under current doctrine.[83] While it may be of use when a genuine mistake lies behind the defamatory communication, it is not a necessary course of action and can at most be considered an alternative dispute resolution mechanism to conventional litigation. More importantly, it does nothing to alter the potential for lawsuits[84] nor does it substantially affect the restrictive and normative impact of the present strict standard of liability.

The specific rules which collectively create the present standard of liability are not however without an underlying rationale. Some of the broad arguments in support of imposing a high level of responsibility for publishing defamatory statements have already been reviewed. These though operate on an abstract level and, to truly support the present measure, the rules that constitute this standard must be consistent with this

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raised. In addition, this structure makes it much easier to establish the *prima facie* right necessary to gain injunctive relief.

82 On the specific legislation, see Porter and Potts, *supra.*, note 80, para. 144 and 145.

83 Since an apology and retraction is only relevant to the mitigation or limitation of damages and is not a bar to the continuation of an action, it is even less likely that the defendant will agree to this option given that, unless worded in a disclaiming fashion, it may be deemed an admission and reduce the possibility of raising a successful defence.

84 The option may reduce the number of actual lawsuits.

theoretical basis. To determine this fundamental issue, it is necessary to firstly examine the nature and specific rationale of these rules as they relate to the *prima facie* standard and to focus on the practical implications that arise due to strict liability. In addition, the specific bases upon which liability is lifted within the defences must be examined to determine the reasons and the effect of such legal justifications for causing defamatory harm. With a clearer understanding of the rationale and ramifications of these rules, this will form the foundation for a subsequent review of means by which the severity and impact of the present standard of liability can be minimized.

The most important issue within the prima facie case is the 'defamatory' criterion. Not surprisingly, it is the matter most often contested in litigation. A variety of definitions have been used although it has been suggested that no one standard has proved to be wholly satisfactory.[85] The traditional tests, "calculated to injure the reputation of another by exposing him to hatred, contempt or ridicule"[86] or causing the plaintiff to be "shunned or avoided,"[87] have for the most part been discarded on the basis that they are too narrow in application or contain misleading elements.[88] To require such an extreme reaction as hatred or actual avoidance of the plaintiff by the the audience to the statement before the action is founded would allow many harmful comments to go unremedied. A test that has become more popular is that which "tends to harm the reputation of another [so] as to lower him in the estimation of the community or to deter third persons from associating or dealing with him".[89] This standard is clearly broader in application than the conventional tests as it is based on

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[85] *Gatley on Libel and Slander*, (8th ed., 1981), p.6, note 4. This statement echoes that of Lord Lyndhurst in the 1843 House of Lords Select Committee Report to the effect that a "logical definition" had not yet been reached.

[86] Baron Parke in *Parmiter v. Coupland* (1840), 6 M & W 105 at 108, 151 E.R. 340 at 342.

[87] Cave J. in *Scott v. Sampson* (1882), 8 Q.B.D. 491, approved by Scrutton L.J. in *Youssoupoff v. Metro-Goldwyn-Mayer Pictures Ltd.* (1934), 50 T.L.R. 581 at 584.

[88] For a review of various criteria, see Brown, *supra.*, note 89, p. 40-44. For a detailed criticism of the statutory criterion suggested by the Faulks Committee, "likely to affect a person adversely in the estimation of reasonable persons generally", see the minority report of Mr. William Kimber, "Report of the Committee on Defamation" United Kingdom, Cmnd. 5909 (1975), p.197-8. Perhaps the difficulty in arriving upon one definitive definition is aptly summarized by Mr. Kimber's ambiguous conclusion that the the suggested criterion is, at once, too broad and too narrow.

[89] *Restatement, Torts, Second*, s.559. Approved by Linden, *Canadian Tort Law* (4th ed., 1988) at 629. This test is similar to that approved by the Faulks Committee: "..publication to a third party of matter that in all the circumstances would be likely to affect a person adversely in the estimation of reasonable people generally." The dissimilarity lies in the insertion of a "reasonable" person criteria in the Faulks standard. See "Report of the Committee on Defamation" United Kingdom Cmnd. 5909 (1975), para. 65.

harm alone and not the degree of incitement created amongst the audience to the communication.[90] More importantly, the criterion closely parallels damage to reputation, the interest protected by the action. This appears logical since this threshold, given that general damages are presumed, constitutes the basis for alleging that loss has been suffered.

As this criterion is a "standard of measurement",[91] it cannot exist in a vacuum and a perspective must be adopted from which to view and apply the governing test against the allegedly defamatory words. Whereas the prevailing view in England appears to be that of "right thinking members of society",[92] Professor Linden has advocated a more specific approach under Canadian law.[93] In his view, a remedy should still be granted if the plaintiff's reputation has been negatively affected in the estimation of a group that is significant to the plaintiff though not necessarily large and even despite the fact that the reputation may not have been affected in the estimation of the general populace. This would appear to be a better approach as it is more consistent with the underlying compensatory function of the action and ensures that the plaintiff is entitled to a remedy for what may be a substantial and actual injury to his reputation although that reputation may not be popular amongst a general segment of society. A standard centred upon "right-thinking members of society" can be criticized as being a standard of the moral majority[94] and a popularity test, an undesirable result. Although one exception to the "significant group" approach must be noted, that the group within which the plaintiff's reputation is affected is one that holds socially acceptable values, this can be justified on policy grounds. An individual should not be entitled to compensation for an injury to a reputation that is not of any socially redeeming value and not deserving of protection under the law.[95]

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90 This criterion and the Faulks criterion can be considered too broad: the phrasing "tends" and "likely to" extends the ambit of defamation to comments that may or are inclined to be defamatory without any degree of certainty.

91 Linden, *supra.*, note 89 at 630.

92 Lord Atkin in *Sim v. Stretch*, [1936] 2 All E.R 1237 at 1240. Also called the *arbitrium boni*;, it is also approved by the editors in *Duncan & O'Neill on Defamation*, (2nd ed., 1983) para. 7.05.

93 See Linden, *supra.*, note 89 at 630-31 citing Holmes J. in *Peck v. Tribune Co.* (1909), 214 U.S. 185 at 190.

94 *Ibid.*

95 This logic though, if taken to the extreme, is applicable to the "right thinking member" criterion.

Since this perspective is adopted, it is apparent that the issue of whether a statement is defamatory is unrelated to the defendant's reasons for communicating. Whether the defendant intended to harm the plaintiff---whether he intended his words to be defamatory and cause harm---or was at fault in his statement being construed by others as being defamatory are irrelevant to this determination.[96] The primary rationale for disregarding the conduct of the defendant under this issue appears to be based on the general aim of the action, the compensation of the individual for unwarranted harm caused to his reputation. A 'defamatory' statement causes injury to reputation. Reputation is the estimation by which the plaintiff is viewed by others, and consequently, the issue of whether a defamatory act has occurred is simply a question of whether the plaintiff has been harmed from the perspective of others and not from the perspective of the defendant.[97] On this basis, the defendant's understanding at the time of initiating or repeating the statement, his reasons for acting, and his intentions with respect to the consequences of his act logically have no bearing on this specific issue.

It is important to note though that without the requirement of proof of specific damage, the defamation criterion, whether applied from the perspective of a right thinking member of society or a more specific group, is separated from the actual effect of the communication. The issue of whether the defendant's publication is considered defamatory of the plaintiff is in essence a hypothetical decision by the jury or the judge based on their understanding of the words placed against this standard.[98] The test does not involve an assessment of the actual injury as a matter of legal fact or a determination of the extent to which the harm is sufficient to warrant compensation. Rather it is a conclusion based on the words used. As a consequence, the criteria is in substance a standard of conduct concerning the act of publishing a communication rather than the act of 'causing' defamatory harm to the plaintiff. Parties contemplating publishing

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96 As a matter of principle these elements are irrelevant. However, as evidence of the circumstances is admissible if an innuendo is raised or if the identification of the plaintiff as the subject of the statement is not obvious on the face of the statement, it is possible that lack of intention or fault can be submitted in evidence under this issue and influence the arbiter. See note 81, *supra*.

97 This governing principle of compensation can also be seen in the shift to the new criterion, where actionability is predicated on whether any harm to the plaintiff has occurred at all as opposed to whether a certain reaction of a volatile nature is caused.

98 It is true that evidence submitted of actual injury, that is special and general damage, will have a bearing on this issue but in theory only indirectly.

information must adhere to this normative rule proscribing publication of a statement that may be interpreted as defamatory. Although this result can be explained on the basis that this criterion constitutes an approximation of injury only,[99] and that if actual defamatory harm had to be proved under this specific issue it would run contrary to the general principle that damages are presumed, the specific focus that is created under this rule should be clearly recognized when looking at the impact of the *prima facie* standard of liability.

As a result of the abstracted nature of this assessment, the key issue in deciding whether words are defamatory is really centred upon the meaning attributed to the defendant's communication. Since a variety of potential interpretations through syntax, semiotics, expression and context are possible for any statement, a technical structure of rules has evolved in this area in order to catch the range of subtleties that can be contained within any given communication. The imputation may be apparent on the face of the impugned statement, either explicitly in the natural, ordinary and common meaning of the words or implicitly through a non-literal, oblique or implied meaning.[100] Or it may also arise by virtue of extrinsic facts, some special knowledge known only to a small body of people which gives rise to a defamatory sting when coupled with the defendant's statement. This latter form of interpretation is called "true innuendo" or "legal innuendo".[101] These rules can be perhaps best explained on the basis that they pose a structure of possible interpretations that the actual audience to the communication could have experienced. Just as important though is the rule that the plaintiff must identify one of these forms of meaning in his pleadings. This provides the defendant with an opportunity to know the case that must be met and also defines the issue to be contested.[102]

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99 It would be simple enough for the plaintiff to produce less than objective witnesses to testify that the publication in their estimation affected their estimation and the status of the plaintiff. It is also difficult to establish actual proof of injury to such an intangible quality as reputation. Both the ease of establishing some evidence and the difficulty in establishing conclusive proof of injury warrant removing the question from an actual assessment of fact and incorporating a hypothetical standard as a presumptive conclusion.

100 This latter form has come to be called in typically confusing legal terminology "false innuendo".

101 For a more detailed account of the distinction between a true and a false innuendo, see the judgment of Lord Devlin in *Rubber Improvements Ltd. v. Daily Telegraph* (1964), A.C. 234 at 280, [1963] 2 All E.R. 151 at 170.

102 Prior to the mid-19th Century and the *Common Law Reform Act*, U.K., 1852, these pleading requirements were substantive and their absence was fatal to a case.

As several of the defences as well as the defamatory criterion and reference to the plaintiff will be affected by and turn on the interpretation of the meaning of the communication, this preliminary issue is often a critical factor to the success or failure of a party's case.[103] Although the circumstances surrounding the publication can be raised to establish the meaning alleged, the defendant's intended meaning is irrelevant to this determination of fact.[104] This rule would also appear to be founded on the general principle that the plaintiff's case is primarily a matter of determining whether an injury has occurred that is deserving of compensation. The audience's interpretation of the communication is the essential concern, not the defendant's understanding and intentions. The perspective utilized is again an objective assessment based on the approach of an ordinary reader, not overly perspicacious or overly dull but bringing an average demeanor to the task.[105] Although this test can be defended on the basis that this criterion may be in many cases the mean of the audience to whom the statement was published, the logic of using an objective standard to determine this issue can be questioned. Given that the plaintiff must establish under doctrine concerning publication that there was an actual recipient who understood and appreciated the import of the communication,[106] it is difficult to see why the understanding of the actual recipient or recipients is irrelevant to this specific issue when the audience's general understanding is a requisite to liability for publication. The best explanation perhaps lies in the complexity of legal proof. It would be simple for both the plaintiff and the defendant to adduce witnesses who attributed contradictory interpretations to the communication which would create a dilemma of credibility. Consequently, the matter is better removed from the realm of actual fact to a conclusion by the arbiter of fact.

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103 The meaning attributed to the communication is also crucial to establishing the defence of justification. For instance, in *Rubber Improvements Ltd. v. Daily Telegraph* (1964), *supra.*, note 101, liability turned on the meaning to be ascribed to the allegation that the police were investigating the plaintiff and the plaintiff company for fraud. Whether this constituted an actual allegation of fraud or a mere suspicion was crucial to determining whether the words were defamatory and whether the defendant had established a justification.

104 In the words of Lord Bramwell in *Capital & Counties Bank v. Henty (1882)*, 7 App. Cas. at 790, "The question is not what the writer of an alleged libel means, but what is the meaning of the words he has used." See also Diplock L.J. in *Slim v. Daily Telegraph*, [1968] 2 Q.B. 157 at 172 and Turgeon J.A. in *Bureau v. Campbell* (1928), 23 Sask. L.R. 79 at 84

105 See *Gatley on Libel and Slander, supra.*, note 85, para. 88-92; and see *Slim v. Daily Telegraph, ibid.*

106 *Arnott v. College of Physicians & Surgeons of Saskatchewan* (1953), 10 W.W.R. 446 at 465 (Sask. C.A.).

This result again though illustrates the abstracted nature of the test to be utilized in establishing the cause of action.

Several adverse consequences can arise given that the defendant's intention is separated from the actual meaning attributed to the communication. For instance, a defendant may intend that his words not be defamatory in what he believes are their natural and ordinary meaning but the arbiter may place a different natural and ordinary meaning on the words which consequently is considered defamatory. Or a defendant may believe that his words contain no implied meaning which the arbiter determines does exist and is defamatory. The risk of a variation between the intended and a perceived meaning is clearly placed with the defendant. To a certain extent this can be justified on the basis that it ought to result in more attention being paid to the clarity and accuracy of communications. If a communication contains comments that reflect upon another person, more care should be exercised in ensuring that the content of the communication is unambiguous and straightforward. This effect does not hold true in the most extreme application of this rule when a defendant intends that his words not be defamatory in their natural and ordinary meaning or through any implied meaning but by reason of extrinsic facts the statement is found to give rise to an entirely different meaning which is defamatory. While liability without intention or fault cannot be criticized when the 'innuendo' is intentional and the purpose of the statement is to refer to those extraneous, oblique facts in a mischievous manner, the rule applies equally to the situation where the defendant was unaware of the extrinsic facts and was not in a position where he ought to have been aware or have foreseen the interpretation relating to the extrinsic facts. In this instance, the application of the rule can be criticized. If unforeseeable harm is still actionable and no significance is attached to the active steps or measures that the defendant took or that he failed to take prior to communicating in order to foresee or be placed so as to foresee harm, there may not be any benefit to the defendant in terms of avoiding liability for taking any active steps to ensure no harm arises as a result of his communication.[107]

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107 Although taking any steps will minimize the risk that this will happen, the rule presents a situation whereby a decision may be taken to not take any steps because they may be of no benefit.

The standard of an ordinary or average interpretator is used also to determine whether the defendant's statement refers to the plaintiff.[108] Under this issue, liability will arise if it is established that in the arbiter's estimation an ordinary, sensible person would reasonably believe that the statement referred to the plaintiff.[109] Since the belief must be reasonable and not a mere intuition, mere speculation that the plaintiff is being referred to will not found an action.[110] Although this might appear to restrict the application of the rule, due to the irrelevance of the defendant's intention and fault, liability will still arise even if the defendant did not know the plaintiff and only intended to refer to a fictitious person[111] or a different person with the same, coincidental name as the plaintiff.[112] Further, the defendant still will be held legally responsible if he was speaking the truth in so far as he knew and intending to refer specifically to a particular person when his statement, by virtue of unknown extrinsic facts, is considered defamatory of an unknown individual.[113] As a result, it is clear that the risk that someone may be "hit" by the defendant's communication is placed with the defendant. The rule should cause communicators to be more specific in the identification of individuals so as not to inadvertently harm others, an effect directly oriented towards media enterprises.[114] However, it creates a dilemma for writers of fiction, satirists, filmmakers and other artists[115] whose interests are clearly not recognized.[116]

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108 This element of the action is sometimes called by its older nomenclature, the colloquium.

109 *Morgan v. Odhams Press Ltd.*, [1971] 2 All E.R. 1156 at 1165, [1971] 1 W.L.R. 1239 at 1248; *Church of Scientology of Toronto v. International News Distribution Co.* (1974), 48 D.L.R. (3d) 176, (Ont. H.Ct.).

110 Despite the reasonableness criteria, it is sufficient if the plaintiff produces one witness to testify that he or she believed the statement referred to the plaintiff: see *LeFanu & Malcomson v. Bull* (1848), 1 H.L. Cas. 637, 9 E.R. 910.

111 *Jones v. E. Hulton & Co.*, [1909] 2 K.B. 444 (C.A.); on appeal *sub. nom. Hulton (E) & Co. v Jones*, [1910] A.C. 20, [1908-10] All E.R. 29.

112 *Newstead v. London Express Newspapers Ltd.*, [1940] 1 K.B. 377, [1939] 4 All E.R. 319 (C.A.): the "case of the Camberwell bigamist".

113 *Cassidy v. Daily Mirror*, [1929] 2 K.B. 331.

114 The objective test can also work to the advantage of a culpable defendant when the actual intention was to refer to and harm the plaintiff and the statement was not construed through the objective perspective as referring to the plaintiff.

115 While the aim of an artist may be to be realistic, they do not want to be too realistic or they may fall within the broad application of this rule.

116 This caution can be seen in the standard disclaimer that is ritually inserted in prefacing to literary works of fiction and films. Under existing doctrine, the disclaimer is, of course, ineffective in exempting liability because the publishers intention is irrelevant to the issue of reference to the plaintiff. It does though put the audience on notice. However, in jurisdictions which have enacted the statutory defence of innocent defamation, the disclaimer would be evidence of lack of intention.

This rule perhaps has its most contentious application in situations where statements are made concerning a group of people or a collective entity. If the communication is "understood to be of and concerning" the plaintiff specifically although the literal comment is directed at the group or class generally, then liability may still issue.[117] "The size of the class, the generality of the charge, and the extravagance of the accusation" are all elements to be considered[118] in determining whether there has been a reference made specifically to the plaintiff. This three-fold test, while providing flexibility in administration and application, does nothing to create any certainty and predictability in the law. Coupled with the low threshold of what is considered defamatory, it may be so broad as to impose liability for a statement that speaks only critically of an action or policy of an institution which due to specific knowledge may be construed as referring to a specific but unmentioned individual who is the author of such a policy or engineer of the action.[119] The consequence is that liability cannot be avoided by generalizing which is undoubtedly a good result when the defendant appears to be intentionally or recklessly circulating false information or accusations but mischievously avoiding liability by not referring to the plaintiff directly by name or through generalizing. It also can be justified when the target of an attack is such a small group that the "sting" directly affects each and every individual in the group and the allegation is serious.[120] However, if the statement is directed specifically at the group or institution with no intention directed towards an individual, then the result can be questioned as it severely restricts discussion on the activity of bodies, organizations, associations, departments and other groups which collectively administer and perform important functions in a representative capacity on behalf of others.[121]

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117 *Knupffer v. London Express Newspapers Ltd.*, [1944] A.C. 116, [1944] 1 All E.R. 495.

118 *Ibid.* at p.124 and 499. It may be argued that the court confused the issue as to whether the statement is defamatory, the generality of the charge, with whether it refers to the plaintiff.

119 In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); 273 Ala. 656, 144 So. 2d 25 (1962), the defendant's critical comments on the operation and conduct of the local police generally were seen by the jury to refer specifically to the chief of police.

120 Larger groups, if ethnically based gain some means of protection, subject to prosecutorial discretion and the constitutionality of the provision, from S. 281.2 of the *Criminal Code*., the 'hate literature' section.

121 See Chapter I at page 13-14 where it was argued that one of the drawbacks of the present standard of liability is that a communication, such as a general comment, has the potential, unwittingly, to be actionable.

The meaning of a communication and whether it is considered defamatory, that is whether it refers to the plaintiff and affects his reputation, are the principle issues that arise in a paradigmatic case. The compensatory rationale underlying the tort is clearly manifested in the rules governing these elements. The simple question that arises is whether or not the plaintiff has suffered an injury that is deserving of compensation. While proof of falsity might be considered to be an adjunct to proof of defamatory content, this burden is placed with the defendant. This has been explained on the basis that the present law embodies a presumption that all individuals are possessed of a good reputation and a *prima facie* defamatory statement is a false statement. This though imposes a value judgment. It is perhaps better to suggest that the defendant, having made an allegation, is better placed and has an obligation to establish the truth of his comment. This rationale does not extend to other issues concerning the content of the communication. The defendant's belief in the truth of his statement or in the importance of his communication as a matter of public or private concern are important issues but not regarded as important enough under current doctrine to factor upon *prima facie* liability. These matters generally relate to the context and broader background against which the impugned communication was published. By removing the relevancy to the realm of the defences, the *prima facie* issue is simplified and more clearly defined but at the same time these issues take on a secondary significance within the action.

The third constituent element of the plaintiff's case, publication, is concerned with responsibility for the actual transmission of the communication to a third party as opposed to the content of the communication. As the modern action is viewed as being founded on the plaintiff's interest in reputation and third party relations, publication to the plaintiff alone which may injure feelings and cause emotional and physical harm[122] is not sufficient to found the action. The plaintiff must establish that publication to a third party did, in fact, occur. The defendant's intention and fault is also not relevant to this specific burden that the plaintiff must discharge. However, these matters may be raised by the defendant in rebuttal. If the defendant intended to publish his statement but did not intend to publish it to a third party and was not in a position to anticipate or

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[122] Given the low threshold under the cause of action, this restriction on actionability can be defended on the basis of a "floodgates" argument. The civil and criminal action of assault also protects, if imperfectly, the plaintiff from defamatory 'fighting' words spoken directly to him.

foresee that a third party might receive it,[123] the defence of accidental publication may apply and there will be no liability.[124]

This exception to the general standard of strict liability has been questioned on the basis that it is illogical for a defendant to be held legally responsible for the intentional publication of accidentally defamatory material when he will not be held legally responsible for the accidental publication of intentionally defamatory material.[125] The criticism is valid when the defendant is communicating intentionally defamatory material to the plaintiff in order to inflict emotional suffering. If there is no valid reason for the communication, it is difficult to see why legal responsibility should be lifted when the defendant has put into circulation potentially harmful material although the transmission to third parties is accidental. However, the defence may apply where the defendant knows that his allegation may be defamatory but publishes it to the plaintiff in order to gain a response and ascertain the truth or for some other beneficial reason.[126] The criticism is also limited to the situation where the defendant is publishing intentionally defamatory material, and not an inadvertently defamatory communication. In these instances, the accidental communication to a third party, if not negligent, may be less than culpable.

In application, the extent of this exception to absolute liability in the constituent elements of the cause of action is also limited. The ambit concerns only the specific matter of whether the defendant intended to publish his statement to a third party which must be distinguished from the more common matter of whether the defendant intended to make the particular statement that was published.[127] A misprint in a published text, a misquotation in a speech or a broadcasting *faux pas*, where the communicator intends to make a statement to his audience but not in the form that it is received, do not fall

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123. The traditional formulation, whether actual publication to a third party was a natural and ordinary consequence of the defendant's initial act, has been re-formulated into the more current language, whether the publication to a third party was reasonably foreseeable.

124 See *MacNichol v. Grandy*, [1931] S.C.R. 696 where Duff J. stated, *obiter dictum*, that the defendant may still rely on the defence when he accidentally publishes maliciously defamatory matter.

125 Fleming, *The Law of Torts* (5th ed., 1977) at 543 cited in Wright & Linden, *Canadian Tort Law: Cases, Notes and Materials* (7th ed., 1980) at 16-27.

126 The most obvious example is when a charge of misconduct is made directly to the plaintiff to gain a response and explanation as was the case in *MacNichol v. Grandy*, *supra.*, note 124.

127 *MacNichol v. Grandy*, *supra.*, note 124.

within the scope of the rule. The defence most often arises in situations where the audience to the defamatory matter is small and the harm usually minimal, as in an internal corporate or domestic setting,[128] where a third party has inadvertently overheard a defamatory statement published directly to the plaintiff[129] or where a third party has opened a communication directed to and intended only for the plaintiff.[130] Arguably it in effect operates as a *de minimis* principle and prevents what may be considered to be an insignificant event from being the subject of an action. While the logic underlying the defence can be criticized, its effect may not be significant as it applies primarily to 'slander' and limited audience 'libel'. If the defence was relied on and extended to larger institutions such as radio and television stations in *ex tempore* broadcasts, the result would be less than beneficial as the incentive would be lost to ensure that 'accidental' content was not disseminated in such instances. However, given statutory provision for apology and retraction that can be used in the case of a clear accident, this development is improbable.

One other exception to absolute liability for publication must be mentioned, the defence of "innocent dissemination".[131] If the defendant can establish that he falls within the classification of a 'disseminator', that he had no actual knowledge of the defamatory matter contained in the publication that was distributed, and no reason to believe that the publication in question contained defamatory matter, liability will be lifted.[132] Libraries, retail vendors and wholesale distributors are the most obvious members of this class although there is little precedent as to the actual extent and parameters of what constitutes a 'disseminator'.[133] As an exception to the general

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128 For instance, see *Tompson v. Dashwood* (1883), 11 Q.B.D. 43: mistaken mailing; *Hills v. O'Bryan* (1949), 2 D.L.R. 716: publication to the plaintiff's friend, sister and son; *Jackson v. Staley* (1885), 9 O.R. 334: publication to the plaintiff's wife.

129 *McNichol v. Grandy, supra.*, note 124 where the sole recipient of the defamatory utterance was in an adjoining room and the defendant had no reason to believe that there was anyone within hearing distance.

130 *Huth v. Huth* , [1915] 3 K.B. 32.

131 See *Duncan & O'Neill on Defamation*, (2nd. ed., 1983), para. 16.04, note 3. As the conduct of a disseminator is relevant to whether the defence has been established and in particular his efforts in reviewing material for defamatory content, it would appear that this is best phrased as an issue of publication or re-publication.

132 For the origin of this doctrine see *Emmens v. Pottle*, (1885) 16 Q.B.D. 354 (C.A.); and further *Vizetelly v. Mudie's Library*, [1900] 2 Q.B. 170 and *Lobay v. Workers & Farmers Publishing Assoc. Ltd.*, [1939] 2 D.L.R. 272 (Man. Q.B.).

133 The defendant most probably must establish that he is not the author, originator, nor involved in the process of originating the defamatory matter and that he merely performed mechanical acts in

principle of liability without regard to fault or intention, it is difficult to understand[134] why a distributor should be treated any differently than an individual who repeats a defamatory statement.[135] Both parties contribute to the circulation and spread of the damage although they may not be the originators of the original harm. The rule in effect creates two levels of legal responsibility: a primary level with strict liability for those who originate or create communications and a secondary level of responsibility for those who merely circulate communications.[136] When both an originator and disseminator are named as defendants in the same action, the result can be justified on relative culpability. However, it can be questioned when, due to jurisdictional boundaries or otherwise, the disseminator is the sole defendant. In this instance, a plaintiff may be faced with no remedy because of the mere location of potential defendants.

It is obvious that a disseminator does not create defamatory matter and is a mere conduit for the harmful instrument created by others. It has been suggested that for this reason there is less risk of the possibility of harm arising from the conduct and activities of a distributor of communication materials.[137] However, as a participant in the communications industry, it is difficult to see why a distributor is differently or better placed than a proprietor or editor of a newspaper who may not be involved, and as a matter of journalistic principle and conscious decision is often not directly involved, in the publication of matter that may prove to de defamatory.[138] It may be better to view

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distribution. In this context, the commercial activity and purpose of the defendant's business may be looked at. It is unclear as to whether a regional radio or television station carrying a syndicated program would be considered to be a disseminator. Case law has been restricted to decisions concerning defamatory matter concealed within the cover of a book.

134 See Scrutton L.J. in *Bottomley v. F.W. Woolworth & Co. Ltd.*, (1932) 48 T.L.R. 521 where the learned Justice cannot identify the principle upon which this rule is based.

135 For instance, is there a real distinction to be made between the employee of a newspaper delivering newspapers in bulk to vendors who may be seen to be part of the publication process and be primarily liable and the street vendor of newspapers or the newstand who would be considered a disseminator?

136 This distinction could be used to argue for a special status for the media, who often are mere conduits for information originating elsewhere. This of course is already reflected in the 'fair report' privilege.

137 Professor Weiler has criticized this argument on the basis that the concept of risk is irrelevant when speaking in terms of a strict liability tort. See Weiler, "Defamation, Enterprise Liability and Freedom of Speech", (1967) 17 U. Tor. L.J. 278 at 307.

138 Professor Weiler, *ibid.*, also makes the important point that a disseminator has the opportunity through bargaining and contractual indemnities to, in effect, ensure against the loss. However, inequality in bargaining power can affect his assumption. It should also be noted that distributors and disseminators are an important and key part of the communication process. For instance, Sir James

disseminators as having a special institutional status. They carry on an activity of social value in providing a channel for the distribution of communications. To be subject to a legal duty to root out all defamatory material would materially interfere with the conduct of their business and negatively effect our common means for distributing information, an essential function.

One final matter that is often overlooked under the issue of publication is the extent to which participation in the act of publishing will result in liability. In practice, apart from the obvious author of the statement and repeaters or parties who make the defamatory content known to others, liability has been extended to editors, publishers or proprietors,[139] printers or typesetters, proof readers and broadcasters, no matter the extent to which they are actively involved in the creation of the defamatory matter. Lack of knowledge that the content of the communication is defamatory or that the defamatory communication has been made may or may not be relevant to legal responsibility. The law has been extended in certain instances so as to impose a positive duty on parties to stop the circulation of obviously defamatory material.[140] This duty, requiring all involved in publication to assess and determine whether matter is potentially defamatory[141] and to 'root out' and stop the circulation or further publication of such matter, is indeterminate.[142] Arguably, it is so indeterminate so as to have little beneficial effect.[143]

Goldfield in the late 1970's settled his libel action against numerous distributors of the satirical English weekly, *Private Eye*, on the basis that they cease distributing the magazine, an obvious attempt at effectively closing down circulation and hence the actual publication of the scandalous magazine for good.

139 A publisher or proprietor may be liable directly as a participant in the publication process, or may be vicariously liable as the employer of the editor, reporter or broadcaster.

140 *Byrne v. Deane*, [1937] 1 K.B. 818, [1937] 2 All E.R. 204 where failure to remove a defamatory notice from a place over which the defendant had control gave rise to liability.

141 The consequences of this rule in action can be seen in the 1988 decision of the administrators of the National Business Writing Awards to reject the submission of a *Toronto Life* article on the Reichmann brothers, the subject of a libel suit, for fear that acceptance for consideration of an award may be deemed to be a 're-publication.'

142 How far the duty extends is unclear. One writer has questioned whether volition and the degree of physical effort involved should be the criteria: see Wright & Linden, *Canadian Tort Law: Cases, Notes and Materials,supra.*, note 125 at 16-21 where the question is posed whether defamatory comments permanently etched in stone gives rise to the same duty as more transitory posters.

143 For instance, is the individual who reads an article that may or may not be defamatory and passes to an acquaintance on the basis of the interest arising either from that article or another article in the same publication liable? Are the Board of Directors of a newspaper, who may set policy but only generally on the direction that will be taken on investigative subjects legally responsible for specific defamatory articles.

As exceptions to the *prima facie* standard of strict liability and general tort theory underlying strict liability,[144] the defences of accidental publication and innocent dissemination have been criticized as anomalous.[145] If a general rationale based on a principle of strict liability is to be the foundation of the *prima facie* standard, it is difficult to see why there should be any exceptions to the general level of responsibility. However, their limited application does not significantly affect the substantial concerns arising from the present strict *prima facie* standard and they tend to arise in the uncommon case. The other substantive defences to the action provide a broader basis and a more general application for protecting communications and certain occasions from the defamatory ambit. They can be classified into two essential categories: defences that are unqualified in nature and are based solely upon a requirement of objective fact, either the context or setting in which the communication was made or the content of the communication; and defences that are qualified in nature and dependent upon the existence of a requisite lack of culpability in addition to other elements. As stated previously, given the present strict *prima facie* standard of liability these defences are of fundamental importance to the maintenance of a proper balance between the interests underlying the action. The extent to which they not only accommodate communication but encourage open communication is a fundamental question in determining the actual impact of the present standard of liability.

Justification and absolute privilege or immunity fall into the first category of defences. The most popular rationalization for the existence of justification or truth as a defence was phrased succinctly by Littledale J. in 1829: "the law will not permit a man to recover damages in respect of an injury to a character which he either does not, or ought not, to possess."[146] That is, the action protects real not apparent reputation and a plaintiff cannot suffer damage to his real or 'true' reputation through a truthful

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144 The infrequently used defences of inducement of publication by the plaintiff and consent to publication should also be noted. On the former, see *King v. Waring*, (1803) 5 Esp. 13, 170 E.R. 721, but *Rudd v. Cameron*, (1912) 27 Ont. L.R. 327, 4 D.L.R. 567 (C.A.). A fact pattern where consent is an issue may also give rise to the defence of qualified privilege: see *Chapman v. Ellesmere*, [1932] 2 K.B. 431 (C.A.) where consent, under the terms of a contract of association, was considered to create a privileged communication..

145 See Weiler, *supra.*, note 137 at p.284-289. Professor Weiler's argument is based on the view that if defamation is a tort of strict liability, all distinctions reflecting a fault principle within the action must be considered anomalous.

146 *M'Pherson v. Daniels (1829)*, 10 B. & C. 263 at 272, 109 E.R. 448 at 451.

statement.[147] Those who have considered the primary, if not the only, function of the action to be the compensation of the plaintiff for harm suffered have questioned this view and the very existence of this defence. A true statement can be equally 'defamatory' and damaging of the plaintiff's reputation as a false statement.[148] The oft-cited example is the publication of dated but true information on the criminal conviction of a 'reformed' individual[149] who has long since established a more upstanding record and reputation amongst his present peers.[150] In order to reconcile this argument with Littledale J.'s dictum, it is necessary to emphasize the words "ought not" in his statement: the law should not grant compensation for an injury to reputation which is contrary to a true statement for clearly a true statement can cause damage to an present and existing reputation.

Hence, it is better to acknowledge that the defence is rooted in policy[151] rather than attempting to reconcile the existence of the defence with other elements of the action. The exception to liability reflects an inherent social value that is attached to the circulation of true statements. This type of comment should not be deterred or the potential for benefit minimized by imposing liability on a party who may be performing a valuable and important task. This defence is perhaps the pivotal element in the distribution of burdens under the present action. Because the onus is on the defendant to plead and establish the truthfulness of his comment, a statement is presumed to be

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147 Or "What is true cannot be defamatory": Tritschler C.J.Q.B. in *Courchene v. Marlborough Hotel Co. (1971)*, 20 D.L.R. (3d) 109, aff'd. [1972] 1 W.W.R. 149. This justification for truth is tautological or self-defining in that a conclusion as to what reputation is serves to define why truth exists as a defence.

148 The most obvious example is the drumming up of a past peccadillo which has long since been atoned for by an individual: such a true statement concerning an unknown and unpublicized fact obviously impacts and affects the current reputation of the plaintiff. For this reason section 8 of the *Rehabilitation of Offenders Act*, 1974, was enacted in England and Wales making this type of statement actionable. No similar legislation exists in Canada.

149 A notorious example of this occurring is the case of Sargent Shriver, the Democratic Vice-Presidential candidate in the 1972 U.S. presidential elections, who was forced to withdraw after disclosure that he had at one time received psychiatric treatment.

150 In *Sutherland v. Stopes*, [1925] A.C. 47 at 74, Lord Shaw of Dunfermline suggested a possible qualification to the absolute nature of this defence if the defendant's statement consisted in the "raking up of a long-buried past" and suggested that the plaintiff's character was still tainted. No judicial approval of this statement has been found, it is more consistent with Scottish law, and is more appropriately considered as having been stated *per incuriam*. Cf. Viscount Finlay in *Sutherland v. Stopes* at p.62; Lord Morris of Borth-y-Gest in *Plato Films v. Speidel*, [1961] A.C. 1090 at 1144.

151 See Fleming, J.A., *The Law of Torts*, (7th ed., 1987), p.545; Harper and James, The Law of Torts (1956), pp. 416-7.

false if the matter has not been raised. As a result, there is a tendency to view a statement that is allegedly defamatory as false unless the defence is raised. This is not necessarily true. It is commonly noted that to plead and attempt to establish justification at trial is a dangerous strategy in that if the defendant fails, he may be exposing himself to the risk of increasing any damage award.[152] Hence, an allegedly defamatory statement may still be true in substance or contain a "ring" of truth notwithstanding the defence has not been raised. Although this can be considered to be a clear bias in favor of the plaintiff,[153] it can be argued that the defendant should carry the obligation of establishing the truth of his statement because of his original assertion.[154]

It is well established, despite criticism, that the defendant's intention is irrelevant to the defence.[155] The consequences of this rule can be criticized: no matter how reasonable or honest the defendant's belief in the truth of the statement is, he still cannot avail himself of the defence unless the truth of the communication is objectively established.[156] Hence, all risk that a communication may not be true is placed on the defendant. This rule clearly deters the publication of information that an individual may believe to be true but is not in a position to determine or establish as true.[157] However at the same time, to permit the belief in the truth of a statement as a defence would involve the tacit acceptance of the circulation of false statements of fact in a significantly greater number of incidences.[158] As well as increasing the amount of defamatory harm, such a defence would cause a certain amount of social disruption in that there would be

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152 Lord Hailsham in *Cassell & Co. Ltd. v. Broome*, [1972] A.C. 1027 at 1071, [1972] 1 All E.R. 801 at 824.

153 This presumption is similar to the doctrine of *res ipsa loquitor* in negligence cases.

154 If an analogy can be drawn with the criminal law, every man is considered innocent/of good reputation, until proven guilty/of bad reputation.

155 *Price v. Chicoutemi Pulp Co.* (1915), 51 S.C.R. 179.

156 At the same time, the rule can also be criticized on the basis that no matter how malicious or how much the defendant is imposing on the plaintiff's privacy, he may avoid liability by establishing the truth. Thus, malicious character assassination if true is within the law unless protected by other actions or legislation. And further, as the defence is presently absolute and divorced from the culpability of the defendant's conduct, a defendant is entitled to rely on facts of which he was unaware of at the time that he published the defamatory statement. Although there appear to be no authorities on this point, this is the opinion of the authors in *Duncan & O'Neill on Defamation*, *supra.*, note 92, para. 12.33, note 1.

157 It also may deter the publication of true information that an individual does not believe he can establish as true in a court of law: see Brennan J. in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

158 Presently, the defence of qualified privilege constitutes the only basis apart from the minor defences when a party will not be held legally responsible for an allegation of false fact.

a greater amount of false information circulated. Not only would this run contrary to the value that is presently attached to true statements of fact as reflected in the existence of the defence in the first instance, it would affect the quality of information in the public domain and reduce the reliance that can be placed on such information.

The defence of absolute privilege is also unqualified in nature. The defendant's intentions or motives, beit to muckrake, garner publicity, or spread untruths and harm the plaintiff, are irrelevant to the primary determination of law[159] as to whether the setting in which the words were published is one to which the defence applies. Understandably, the 'institutional walls' of absolute privilege have been limited to occasions that are important and vital to the effective functioning of our democratic order. The principal bodies that enjoy the benefit are governmental: parliamentary debate and incidental matters,[160] judicial proceedings and communications by an executive member of government are all absolutely privileged communications. In addition, the defence has been extended to important relationships such as that of solicitor/client and husband/wife and to other procedures such as quasi-judicial proceedings and the fair and accurate report of judicial proceedings. Absolute privilege cannot be relied on to avoid liability if the defendant merely believed the occasion in which he spoke was covered by absolute privilege but, at trial, it was determined not to be. The question is one of law to be determined by the judge alone based on the facts as found.[161]

Although there are some discretionary limitations, such as relevance in the case of words spoken in judicial proceedings and fairness and accuracy in the case of reports of judicial proceedings, the ambit of the defence is well-defined by the physical parameters of these institutions. The conventional rationale for the existence of the defence is that, as a matter of policy, participants in these democratic procedures must be free to act without the fear, threat and restraint of defamatory suits and liability. The "common convenience and welfare of society" requires the effective functioning of these institutions and as a result, the interest of individuals in an unsullied reputation

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159 The question is an issue of law after the judge or jury have determined the fact of where the actual publication occurred.

160 The origins of this specific element of the defence have a statutory and constitutional footing: Article 9 of the Bill of Rights (U.K.) 1688.

161 Per Lord Esher M.R. in *Hebditch v. MacIlwaine*, [1894] 2 Q.B. 54 (C.A.).

must be subordinated to the greater social benefit that arises from the unhindered operation of these institutions. On this basis, no inquiry will be made into the truth of the statement or the motivation for publication and the only issue is whether the defence applies. It has been suggested that a more equitable basis for the defence lies in the fact that all of the institutions which enjoy the benefit of the defence have effective internal controls to prevent the abuse of the privilege.[162] For instance, a court of law has the inherent power to rule that a party is in contempt or there exists an abuse of process. The speaker of parliament has similar powers. While this may be a more admirable policy, it has not been adopted by the courts. Absolute privilege has been extended to tribunals and alternative courts which do not have similar powers. That the defence will apply to certain relationships also undermines this view. As reflected in the criteria set out by Lord Diplock in the House of Lords in *Trapp v. Mackie*,[163] it is the public interest in the issues before these democratic institutions and the benefit to be derived from their effective and efficient operation that is the over-riding principle. Although this policy might be extended to justify a more liberal approach to a broader range of 'institutions', the absolute nature of the privilege and its potential for abuse necessarily warrants its restriction to extremely important, definite and limited occasions.

It is a similar public interest, the "common convenience and welfare of society",[164] that constitutes the rationale underlying qualified privilege. In fact, it has been suggested that "there are not many different kinds of privileges, but rather for all privilege there is the same foundation of public interest."[165] Despite this alleged 'common' foundation, there is a clear demarcation in doctrine between absolute and qualified privilege. The latter is not limited to specific pre-determined settings, has been applied in a variety of different factual instances and is a flexible defence based on broad principle. In the words of Lord Buckmaster in *London Association for Protection of Trade v. Greenlands Ltd.*, "the circumstances that constitute a [qualified]

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162 Weiler, *supra.*, note 137 at p.287.

163 [1979] 1 All E.R. 489 at 482, [1979] 1 W.L.R. 377 at 383-4 where Lord Diplock sets out criteria focusing on the nature of the procedure and the issue to be resolved as the relevant factors to determining whether a quasi-judicial body enjoys the privilege. This clearly focuses on the type of institution at hand and not the internal powers of the body.

164 Lord Uthwatt in *Perera v. Peiris* , [1949] A.C. 1 at 20.

165 Pearson J. in *Webb v. Times Publishing Ltd.*, [1960] 2 Q.B. 535 at 563, [1960] 2 All E.R. 789 at 800.

privileged occasion can themselves never be catalogued and rendered exact."[166] The defence will arise when the defendant fairly publishes a statement which turns out to be false in pursuance of a duty or interest, whether his own or anothers, to an audience which has a reciprocal duty or interest in receiving the statement. Whether the duty or interest in publishing the statement is described as a legal duty or a moral or social duty, there must be some foundation of exigency or necessity or underlying purpose that is the reason behind the communication. Significantly, it constitutes the one instance under current doctrine, apart from the fortuitous defences of accidental publication and absolute privilege, where room for error is granted and the defendant will not be held strictly accountable for a false statement. As such, it is vital defence and counterbalance to the strict *prima facie* standard of liability.

While the definition on its face may appear to be broad and the judicial pronouncements on the underlying principle laudatory, the scope of the defence in practice has been limited by a number of rules. Firstly the question of whether a particular occasion is privileged is considered to be a matter of law to be determined by the judge alone. The defendant's understanding and motivations for communicating are irrelevant to this determination.[167] No matter how strongly the defendant believed in the importance of his communication or that the occasion was one which would be afforded the defence, he will not succeed unless the judge agrees after the fact with him as to the necessity of making the communication.[168] Therefore, rather than opening the defence up to instances where there is both an honest reason and approach to the communication, this rule limits the benefit of the defence to the conclusion reached by the bench. It can be argued that the interest or duty on which the defence is founded is not necessarily the interest of the party invoking it but the "general interest of society"[169] as represented by the bench in affording the privilege. In this context, the defence does not encourage the open circulation of information for a prudent individual

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166 [1910] 2 A.C. 15 at 22.

167 An exception, that the mistaken belief of the defendant that the party to whom he was communicating did have an interest in receiving the communication, has been generally accepted based solely on the dictum of Lord Parker in *London Association for Protection of Trade v. Greenlands*, [1916] 2 A.C. 15 at 42.

168 *Hebditch v. MacIlwaine*, [1894] 2 Q.B. 54; *Stuart v. Bell*, [1891] 2 Q.B. 341; *Trafton v. Deschene* (1917), 36 D.L.R. 433, 44 N.B.R. 552.

169 Per Duff J. in *Halls v. Mitchell*, [1928] S.C.R. 125 at 133.

may well refrain from communicating matter which may be important but unverifiable when he cannot be certain that the situation is privileged.

Secondly the idea of reciprocity, the existence of both an interest or duty in communicating on the part of the communicator and an interest in receiving the communication on the part of the defendant, is an essential requirement for the defence.[170] While this mutual interest ensures that the privilege will not be abused and exceeded, there are separate rules that provide for the loss of the defence if the occasion of privilege is exceeded through communicating the matter to unnecessary or irrelevant parties[171] or by communicating unnecessary information on a privileged occasion.[172] The requirement of this link effectively precludes the application of the defence to instances where both the content and the importance of the communication to either the audience or the communicator, but not both, is warranted. In addition, the extent of the concept of public interest has not taken root and the defence has been for the most part restricted to 'private' communications or communications made in restricted settings. Despite the oft-cited but little followed decision in *Adam v. Ward* [173] and a development within several Canadian lower courts towards such a view,[174] the rule has not been extended to encourage discussion on matters on public debate. The Supreme Court of Canada has pronounced twice on this issue that no privilege extends to cover false or excessive statements directed at either a public figure[175] or an issue and figure of public importance as of right.[176] In the public context, the defence has been for the most part limited to statements made by public officials, individuals acting in a public capacity, or private citizens publishing statements to and for the benefit of public officials.[177] On

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170 Lord Atkinson in *Adam v. Ward* (1917), A.C. 309 at 334.

171 *Jones v. Bennett*, [1969] S.C.R. 277 where publication of a slanderous comment to an audience which included newspaper reporters was consider as publication to unnecessary parties.

172 See *Douglas v. Tucker*, [1952] S.C.R. 275 at 286 where the defendant in responding to an accusation went further than necessary.

173 [1917] A.C. 309.

174 *Showler v. MacInnes* (1937), 1 W.W.R. 358; and the Ontario Supreme Court trial decisions of *Drew v. Toronto Star Ltd. & Atkinson* , cited in *Banks v. Globe & Mail Ltd.*, [1961] S.C.R. 74 and of *Dennison v. Sanderson*, [1944] O.W.N. 264.

175 *The Globe & Mail v. Boland*, [1960] S.C.R. 203, 22 D.L.R. (2d) 277: a candidate for public office.

176 *Banks v. Globe & Mail Ltd.*, [1961] S.C.R. 474, 28 D.L.R. (2d) 343: a national union official. One wonders if these cases would have been similarly decided if they had arisen after the U.S. Supreme Court's watershed decision in *N.Y. Times Co. v. Sullivan* and not before.

177 For a review of case law, see Brown, *supra.*, note 79, p.571-591.

this basis, it is perhaps more accurate to say that the rationale underlying the qualified privilege, the public interest and "common convenience and welfare of society", is really a public interest in private communications or communications made for the benefit of public officials.

The other substantive defence to the cause of action is fair comment. As a certain amount of latitude is permitted within the umbrella of 'comment', this defence provides the primary basis in the action under which an individual can express himself with any degree of emotion and artistic impression. It has been said to be based on the "principle of freedom of speech and freedom of expression."[178] Nevertheless, there are several key restrictions on this defence posed by the objective elements that must be established. Firstly, the defendant must prove that his statement concerns a matter of public interest. Secondly, that it is recognizable as comment or opinion as opposed to an allegation of fact and thirdly, that it is based on a foundation of truthful facts. As a result of this last requirement, it can be considered to be in substance an extension of the defence of justification in that the facts, either inferred or stated, must be proven true and no latitude is granted for an erroneous or mistaken imputation of fact within the defendant's comment. In addition, the defendant, unless it is a newspaper,[179] must prove that the opinion was an expression that was, as a matter of subjective belief, honestly held.

The actual scope and the criteria for what constitutes public interest has not been well defined.[180] If the subject matter of the comment affects "people at large, so that they may be legitimately interested in, or concerned at, what is going on, or what may happen to them or others"[181] then it has been suggested the matter is one of public interest. In practice, governmental and judicial conduct, public officials and figures, public health and education, and sports and the arts have been considered subjects

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178 Per Morse J. in *Russell v. Pawley*, [1986] 4 W.W.R. 172 at 181 (Man. Q.B.].

179 See Defamation Act, R.S.A.1970, c.D-6, s. 9 and other provincial Defamation Acts. These statutory revisions are the result of the majority decision of the Supreme Court of Canada in *Cherneskey v. Armadale Publishers Ltd.* (1978), *supra.*, note 78.

180 See the comment of Lord Denning M.R. in *London Artists Ltd. v. Littler*, [1969] 2 Q.B. 375 at 391, [1969] 2 All ER 193 at 198: "There is no definition in the books as to what is a matter of public interest. All we are given is a list of examples, coupled with the statement that it is for the judge and not the jury."

181 Lord Denning M.R., *ibid.*, at 391, 198 suggests "affect[ing] people at large" which provides little guidance.

within this domain.[182] There does not appear to be a single principle or criterion that denotes 'public interest'. Rather the courts in each instance have viewed these situations as being 'occasions' of public interest, moments when the setting, content of the comment, and perspective of the speaker was appropriate for the defence to lie. That the defendant believed at the time he published the comment that it concerned a matter of such importance that it was of public interest will not satisfy the test as the issue is one of law for the judge alone. This rule can be justified on the basis that, if otherwise, the defendant could 'create' public interest over a subject matter to which no public benefit or true concern attached. However, similar to the problem with qualified privilege, communicators are faced with the dilemma of having to anticipate and predict whether their subject matter is of public interest and must make a calculated guess as to whether to risk publication and potential liability.

Perhaps the most difficult issue under the defence is differentiating comment from fact. As has often been noted, the distinction is not one of kind but is one of degree, and all imputations must be viewed as lying on a spectrum which runs from clear allegations of fact to clear comment.[183] A comment is obviously a conclusion or inference, a subjective opinion, whereas a statement of fact is a statement of objective events that can be proven false or true. The burden is on the defendant to establish that his communication was clearly comment and that the comment is clearly separated from the facts. If the two are intermingled and inseparable, then the defendant will suffer the consequences of the confusion.[184] The test to be utilized in this determination is the perspective of an ordinary reader[185] and the matter is an objective assessment to be made by the arbiter regardless of the intentions of the publisher as to whether he was asserting a factual allegation or merely expressing an opinion. As a result, the freedom of speech that this defence protects is more obviously a freedom to speak within the parameters of the law. The rules concerning fact and opinion really dictate that opinions can only be expressed in a particular way, that is based on facts and in a form

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182 See the cataloguing set out in Brown, *supra.*, note 79, pp.705-718.

183 See Weiler, *supra.*, note 137 at 319-321 where the author suggests that fact and opinion exist along a spectrum ranging from "brute data" to inferences of fact to clear evaluations or opinions.

184 Fletcher-Moulton L.J. in *Hunt v. Star Newspaper Co.*, [1908] 2 K.B. 309 at 319 (C.A.)

185 Nemetz C.J. in *Vander Zalm v. Times Publishers* (1980), 18 B.C.L.R. 210 at 213 (C.A.).

where any evaluative or subjective assertions are clearly separated from facts.[186] This result though can be justified as if otherwise, an individual would be at liberty to express an opinion, carrying an imputation of a fact that was untrue, and circumvent the present proscription against the circulation of false facts.

The third element that a defendant must establish in order to raise a successful defence of fair comment is that any allegations of fact either contained in the communication or upon which the comments in the communication are based were true and existed at the time of the publication. Similar to the defence of justification, a belief by the defendant that the facts alleged or relied upon were true will not assist the defendant under this issue. As a consequence, a publisher to avoid liability must positively investigate the truth of any fact on which he relies. Of course, because belief at the time of making a statement is irrelevant to the issue of the truth of facts,[187] a defendant can possibly benefit from facts which existed but of which he was unaware of at the time of publication to support the comments that are made. However, this would be the rare case. In practice, the defence provides communicators with some latitude in the form of expression. While the vague definition of what constitutes 'public interest' creates uncertainty, the requirement for the statement to be clear comment and based on true facts can be explained on the same policy ground that the underlies the defence of truth. There is little social benefit to be derived from the circulation of false facts or alleged opinion that carries the imputation and cannot be differentiated from an allegation of false fact.

The defences of fair comment and qualified privilege will also be defeated by a finding of "malice". The burden is on the plaintiff to establish this fact as the law presumes that if the occasion on which the defendant made his communication was privileged or fair comment then his reasons for communicating were valid until proven otherwise.[188] Malice does not constitute an express and overt intention to harm or defame the plaintiff nor a lesser threshold such as the intentional or even the reckless publication of a falsehood. Rather it can be established through a variety of factors.

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186 See the jury address of O' Byrne J. in *Paletta v. Lethbridge Herald Co. (No.2)* (1976), 4 Alta. L.R. 97 at 104 where he suggests that to be 'fair' comment, the facts must be separated from opinion.

187 For a discussion of conflicting dictum on this point, see *Duncan & Neill on Defamation, supra.*, note 92, para. 12.34.

188 Per Schroeder J.A. in *Netupsky v. Craig* (1971), 1 O.R. (2d) 51 at 68, aff'd. [1973] S.C.R. 55.

The tenor of the words and language used, whether the tone or content exceeds the matter which is the proper subject of the privilege, the action by the defendant in investigating the truth of his communication and his general approach to the communication, the conduct of the defendant both before and after the communication and at trial, in addition to other matters, have been considered sufficient evidence of malice.[189] In short, malice is an inference to be drawn from evidence showing generally improper conduct by the defendant.[190] The wide range of factors make this issue totally unpredictable. Given that a primary aim of the action, in addition to protecting reputation, is to impose a high degree of responsibility in communicating, it is not unreasonable that the issue of malice should be focused on the defendant's approach to the subject matter and whether he took the appropriate steps in investigating the accuracy of his communication before proceeding. As well as narrowing the issue, this should result in a higher quality of communication and a recognition of the fact that the defendant should be free to speak freely as long as he adopts a responsible attitude towards the content of his communication.

While the *prima facie* strict standard of liability holds some merit and ensures that a high degree of responsibility is maintained by those publishing information that reflects directly or indirectly upon others, it also gives rise in application to some unsatisfactory results. It may simplify the issue to be determined, place the compensation of the plaintiff to the forefront of the action, minimize harm and ensure that in many instances restitution will issue. However, its broad scope and blanket application restricts communication and gives rise to some irrational results. The defences only mitigate this result in a limited manner. Accidental publication of defamatory comments and the non-negligent publication of defamatory communications by a distributor are exculpatory defences. Absolute privilege is limited in application by virtue of its absolute nature and underlying policy. The other primary defences, fair comment and qualified privilege, are oriented towards ensuring that certain types of communications are tolerated only in limited instances. An allegation of false fact will be accepted only if there exists a special relationship between the parties and the publisher has not acted in an irresponsible manner. An opinion, if clearly phrased as an opinion, will be permitted only if it is based on true facts and relates to a matter of

189 See generally Brown, *supra.*, note 79, pp. 729-767.
190 *Horrocks v. Lowe*, [1975] A.C. 135 at 149, [1974] 1 All E.R. 662.

public importance. While these defences provide a certain room for communication and latitude for expression and error, their application is effectively restricted due to certain rules. It cannot be said that they encourage open communication and counterbalance the present *prima facie* standard of liability. By looking to the history and development of the cause of action, we can gain a better understanding of how this standard evolved which will set a foundation for a discussion of reform.

CHAPTER III

The absence in the early stages of the development of the common law of some form of sanction or remedy against others for the speaking of false and injurious or abusive words has been somewhat of an enigma to legal historians.[191] Although several pre-Norman and medieval legal orders maintained such an action,[192] the royal courts of England did not offer any means by which such disputes could be resolved or prevented until the early 16th Century. With the limited exception of an action based on the statute *Scandalum Magnatum*, which was restricted in access to "great men of the realm", directed against the "devisers...of false news or tales" and seditious in nature,[193] a party who had suffered injury to his status, trade or property due to the speaking of words unaccompanied by any physical act had no common law remedy in the 13th, 14th and 15th Centuries. There did exist during this period limited redress in the local and ecclesiastical courts.[194] The conventional view of legal historians holds that the existence of these alternative forums explains the absence of the remedy in the

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191 For specific articles on this subject, see Veeder, "The History and Theory of the Law of Defamation", (1903) 3 Col. L.R. 546, (1904) 4 Col. L.R. 33; Donnelly, "History of Defamation", (1949) Wisc. L.R. 99; Lovell, "The Reception of Defamation by the Common Law", (1962) 15 Vand. L.R. 1051. For more general discussions, see Baker, D. *An Introduction to English Legal History;* (2nd. ed., 1979) pp.247-54; Holdsworth, W.H. *A History of the English Common Law*, Vol. III and VIII, and "Defamation in the 16th and 17th Centuries" (1925) 41 L.Q.R. 13; Milsom, *Historical Foundations of the Common Law* (2nd ed., 1981) pp. 332-44, and Plucknett, T. *A Concise History of English Law* (5th ed., 1956) pp.491-94.

192 Greek, Roman, Germanic and Anglo-Saxon cultures amongst others provided sanctions or re-dress for injury resulting from the speaking of words. For a brief review of the law in these cultures, see *Carter-Ruck on Libel and Slander*, (3rd. ed., 1985) ed. by Carter-Ruck, P.F. and Walker, R., p. 16-18.

193 First enacted in 1275 (3 Edw. I, c.34) and re-enacted in 1378 (2 Rich. II, c.3) and 1388 (12 Rich. II, c.11), it appears that this statute originated in the specific political circumstances of the day. There is little evidence of civil actions in any significant number being based on this statute until the 16th Century. For an early, but unsuccessful action, see *Beauchamps v. Croft (1497)*, Keilwey 26, 72 E.R. 182.

194 Donnely has also uncovered indications of a customary action in the itinerant merchant's courts of pie powder based on the speaking of unfounded words concerning another merchant. *Supra.*, note 191.

royal courts.[195] As long as potential litigants could find satisfactory re-dress elsewhere, there was no need for, or pressure on, the royal courts to address the issue.

On this basis, it has been assumed that the decline of these alternative courts resulted in litigants looking elsewhere for a more satisfactory remedy which in turn led to the rise of the action on the case for slander in the early 16th Century, the antecedent of our modern law of defamation.[196] It is also thought that the primary legal instrument through which the common law jurisdiction was established was the royal courts monopoly on the remedy of monetary damages, which was utilized to attract litigants and wrest jurisdiction from the ecclesiastical courts.[197] This view, supported by eminent legal historians, led Holdsworth and Pollock to agree that "defamation went wrong from the beginning in making damages and not the insult the gist of the action."[198] In other words, if the cause of action had been focused on the wrongdoing and conduct of the defendant as opposed to the result of the wrongdoing or the damage, it might have developed in a more satisfactory manner. Without the broad historical precedent of compensation for most damage arising from words in most instances, the modern action might not be characterized, and some would suggest plagued, by the present broad ambit of liability.

However, more recent and extensive examination of both the records of the ecclesiastical and manorial courts as well as the early plea rolls of the common law courts indicate that this interpretation of the action may have been inaccurate.[199] The rise of the early action on the case for slander was not founded on the remedy of monetary compensation for injury. Although damages were awarded in 16th Century actions, it was not an essential feature of either the pleadings or actionability. Rather, the specific origin of the action can be traced to a particular conflict between state and church institutions and the attempted separation by the common law courts of secular

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195 See Milsom, *Historical Foundations of the Common Law* , *supra.*, note 191 at 332-3 and Baker, D. *An Introduction to English Legal History*, *supra.*, note 191 at p. 247.

196 Veeder, "The History and Theory of the Law of Defamation", (1903) 3 Col. L.R. 546

197 Lovell, *supra.*, note 191 at 1063.

198 Holdsworth, *History of the English Law*, V.VIII, p. 335; Pollock, *Torts*, (12th ed., 1921), p.324.

199 See Helmholtz, R.H. ed., *Selden Society: Select Cases on Defamation to 1600*, Vol. 101, p.xi-cxi generally. Many of the ideas expressed in this chapter are indebted to the extensive and excellent research and the conclusions drawn from Professor Helmholtz' seminal work. This work will hereinafter be referred to as Helmholtz, *Selden Society*.

subject matter from the purview of the ecclesiastical courts. The new action for slander[200] did involve the creation of a similar type of jurisdiction to that exercised by the spiritual courts, but the development was not an attempt to arrest all jurisdiction over the publication of improper words from these courts. It only concerned those claims involving slanderous words alleging criminal conduct, subject matter which was clearly within the existing domain of the royal courts. The origin of our modern action appears to have been firmly rooted in an effort to address a specific problem, an adjunct of what we would today consider to be the domain of the criminal law. Contrary to conventional assumptions, it was not a typical common law compensatory remedy.

While this alternative interpretation on the origin of the action has little direct relevance and bearing upon modern doctrine, the specific history does illustrate two important points that are germane to our contemporary view of the action. Damage to reputation has not been the unifying principle governing the action from its earliest days. The notion of reputation as being a separate and independent interest to be protected through the law of defamation was a concept which took hold only in the 18th Century[201] and coincided with the rise of compensation as being the primary rationale of tort law. Prior to this period, defamatory law had a less than certain foundation and was to our modern mind a quasi-criminal, quasi-tortious action oriented primarily towards maintaining public order and only providing a limited form of restitution.[202] It was only with the development of reputation or character as being the the primary interest protected by the law, and its corrolary that any communication that "affects" or causes harm to the reputation of another is defamatory, that the broad scope of actionability was established under the action. This development extended the defamatory sanction to all types of comments, regardless of the import, context or consequences of the communication. It is hoped that, with a recognition of this development within the action, a clearer understanding of the foundation and effect of the present strict standard of liability can be gained.

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200 The original action for *slaunder* in the common law courts was not restricted to oral or transitory communications but also encompassed written communications.

201 It can be argued that "reputation" has a firm root in the 17th Century concept of "character", which in the Victorian period was conceived of as having moral connotations.

202 For a contrary view, see Brown, *The Law of Defamation in Canada*, (1987) Vol. 1 at p.16. The author suggests that the action received its present 'form' in the 17th Century. It is respectfully submitted that the principle features of the action---the scope of actionable words, the strict standard of liability, the substantive defences---were all fonnulated in the 19th Century.

To elaborate on the first point concerning the origins of the action, while the jurisdiction of the ecclesiastical courts affected the development of the action for slander, it is overstatement to suggest that the ecclesiastical or local courts provided an alternative remedy in the 14th and 15th Centuries. Both were distinctively different in nature and appeal to the developing common law remedies of the day. The local courts by virtue of their inherent composition were limited to local litigants[203] and also, under the *Statute of Gloucester* in 1285, to hearing complainants seeking no more than 40 shillings in damages. Therefore, the jurisdiction was restricted in both the parties appearing before the court and in the re-dress that could be provided.[204] As customary damage awards in those actions based on the speaking of words amounted in practice to no more than a few shillings,[205] the remedy offered appears to have been even more limited than the Statute of Gloucester necessarily imposed. Furthermore, it appears that actual damages were not an essential or constant element of pleading.[206] Although local practice varied, the offence was often phrased in the nature of a physical trespass or wrong. To the modern lawyer, the action would be quasi-criminal in nature, operating more in the manner of maintaining order and peace, and stopping "the parochial activities of the common scold."[207]

Unlike the new remedies for wrongs such as nuisance, detinue, conversion, assumpsit and trover that were being developed through the action on the case by the common law courts in the 14th and 15th Centuries,[208] the local court action did not offer a true and consistent form of re-dress for a specific injury. Manorial records also indicate that the local action declined significantly in the 150 years preceding the rise of the common law action for defamation and only reappeared in significant numbers after the common law jurisdiction over the action had become entrenched.[209] If there existed

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203 By custom, local residents utilized local courts.

204 Professor Milsom has suggested that the simpler procedure in the local courts was more attractive to litigants, and may provide one reason amongst others for the absence of development of the action in the royal courts. However true of the 13th and 14th Centuries, this theory is not consistent with the fact that the number of local actions declined significantly at the end of the 14th Century yet the common law action did not arise for another 100 years.. See Milsom, *supra.*, note 191 at p. 333.

205 Helmholtz, *Selden Society*, p.lviii.

206 *Ibid.*, p.lvi-lviii.

207 Fifoot, C.S. *Historical Sources of the Common Law.*, p.130.

208 See generally, Baker, *supra.*, note 191, p.175-244.

209 Helmholtz, *Selden Society*, p.lviii-lxiv.

any connection between the demise of these parochial courts and the common law remedy, it would be logical to assume that the common law action would have arisen in the late 1300's when this decline occurred. With little or no conceptual link between the elements and composition of pleading of the local medieval action and the early common law action, the absence of any pattern between the decline and rise of the two jurisdictions, and the lack of any connection between litigants in these actions, it is difficult to see any link between these substantially different forms and forums of redress.

For this reason, the ecclesiastical jurisdiction can be considered as the the principle forebearer of the common law action. However, given that the action in the spiritual courts was also significantly different from the original royal court remedy, it is improbable that it can be considered an "alternative" remedy precluding the rise of a common law action at an earlier period of time. The foundation of the spiritual jurisdiction stemmed from the Constitution enacted by the Council of Oxford in 1222 which provided that all, "who for sake of hatred, profit, or favor or for whatever cause, maliciously impute a crime to any person who is not of ill-fame among good and serious men", were to be excommunicated.[210] Although this text indicates that the primary sanction was excommunication, it appears that it was often the local diocesean custom to direct public penance and private apologies[211] or to impose an order of silence upon the defendant. Much emphasis has been placed on the writ of *Circumspecte Agatis*, issued in 1285 by Edward I, to suggest that the ecclesiastical courts also awarded pecuniary damages to deserving litigants.[212] This writ, which directed royal justices to grant writs of prohibition barring ecclesiastical actions when damages were claimed, is commonly interpreted as indicating that the common law courts assiduously protected their monopoly over temporal damages. It has led to the assumption that there always existed a tension between the spiritual and royal courts concerning the offering of monetary damages, a material remedy which eventually led to the common law courts asserting and enforcing their monopoly over the damage remedy through the development of the action on the case when the effectiveness of the

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210 For the original Latin text, see *Ibid.*, p. xiv

211 *Ibid.*, p.xxxix-xl.

212 Although specifically a writ directed to royal justices, this fiat found its way into the Statute Rolls: 13 Edw. I, c.1.

spiritual courts in dealing with the problems that arose from the speaking of inflamatory words declined.

However, there is little evidence to suggest that pecuniary damages were being granted by the spiritual courts, and further, little evidence to suggest that writs of prohibition were issuing to bar ecclesiastical actions in any significant numbers in the 14th and 15th Centuries. Although there is some indication that a successful complainant may have "sold" the enforcement of penance or an apology in return for money from a guilty party, the extent of this practice is unknown. For the most part, the ecclesiastical courts treated the action of defamation in the nature of an offence, and specifically a sin, with spiritual punishment being the consequence rather than material redress and compensation. The satisfaction of seeing a respondent perform his sentence and the clearing of one's name from scurrilous allegations appear to have been the primary attraction of complainants to this forum. It has been suggested and may very well be that the writ of Circumspecte Agatis reflected a tacit agreement between secular and clerical authority over respective spheres of jurisdiction[213] rather than an indication of an on-going jurisdictional dispute. This interpretation provides a more satisfactory explanation for the the limited number of writs of prohibition that were actually granted. It would also explain why the royal courts refused to intercede and grant a remedy in the 14th and 15th Centuries, despite the attempts of litigants to obtain satisfaction within the common law.

During this period, there are a number of instances when aggrieved parties sought redress either directly or indirectly on the basis of injury suffered from words alone. Several entries on the plea rolls reflect bold plaintiffs attempting to create an entirely new form of action,[214] unlike any existing cause, solely on the basis of ill-spoken words. As well, more subtle plaintiffs sought to gain relief through disguising the facts of their case within an existing and recognized cause of action. Examples exist of actions being brought for trespass *vi et armis* for lying in wait and seizing the plaintiff and alleging in words that the plaintiff was the defendant's villein,[215] or for

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213 *Ibid.*, p. lxii and the authorities cited therein.

214 See the case of the Irish Justices cited in Holdsworth, *History of the English Common Law*, Vol..II, p.366.

215 For instance, YB 2 Edw. IV, 5 (1462) and YB 15 Edw. IV, 32 (1475) cited in Plucknett, *supra.*, note 191 at p. 422.

claiming that the plaintiff had been arrested after the defendant had made an allegation concerning the defendant. However, without the essential facts necessary to the existing and established form, the physical act of the seizure of the plaintiff by the defendant or the actual imprisonment of the defendant, the action would fail.[216] Fyneux CJ expressed the conventional viewpoint of not only the King's Bench but the more conservative Common Pleas in 1497 when he stated that defamation was entirely a spiritual offence beyond the jurisdiction of the royal courts.[217] This statement, commonly interpreted as indicating a deference by the royal courts to the spiritual jurisdiction, is perhaps more indicative of the reluctance of the royal courts to entertain a suit based solely on the speaking of words and a view that such an offence was more properly dealt with by spiritual authorities. As Professor Baker has suggested, it may well be that the common law judges were hesitant to entertain actions based solely on the speaking of words, without deed or document to establish proof of communication, because of a recognition of the inherent difficulty of the subject matter.[218]

The puzzling issue to legal historians has been how and why this position changed within 75 years to the point where the new action for slander consumed a substantial part of the common law courts jurisdiction by 1570.[219] The explanation may lie partly in the subject matter of the ecclesiastical courts jurisdiction and partly in a general shift in attitude towards sanctions based on words in the secular courts. A considerable number of complaints in the spirtual courts were based on words alleging specific crimes.[220] Indeed, it appears that this formed a substantial part of the complaints before the spiritual courts as allegations of sins or spiritual wrongs were not even countenanced by the ecclesiastical courts until the 15th Century.[221] As a consequence of this peculiar jurisdiction, the spiritual courts would often review the very same issue that could have been brought in the royal courts. If the truth of an

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216 The essential facts would entail pleadings and evidence greater than a bare claim for specific damage caused by the speaking of words unrelated to the plaintiff's status or without accompanying physical action.

217 Specifically, "tout spirituel offense" Y.B.Trin., 12 Hen.VII. f.24b, pl.2.

218 Baker, *supra.*, note 191, p.247.

219 For a review of the number of actions based on slander before the royal courts during the 16th Century, see Helmholtz, *Ibid.*, p.lxxxvi-lxxxvii.

220 The reference to 'crime' in the Oxford Constitution which formed the basis of the ecclesiastical jurisdiction was interpreted literally.

221 Helmholtz, *Ibid.*, p.xvi-xxx.

allegation of a crime was raised, the spiritual court would often review whether the alleged felony or crime had been committed and whether the allegation was true, the subject matter of pre-existing common law jurisdiction. The potential for conflict between the spiritual and secular courts was most apparent when a complainant in the ecclesiastical courts sought revenge against his common law indictors on the basis that they had made a false allegation in a charge before the common law courts: the very same issue aired in the secular court, the truth of the charge, would be tried again in the spiritual court with the parties reversed. Although it has been suggested that very few claims based on false indictments came before the ecclesiastical courts,[222] this situation was addressed in 1327 when Edward IV, adumbrating the modern concept of privilege, enacted a law barring the ecclesiastical courts from hearing matters brought against false indictors.[223]

It is this conflict that Professor Helmholtz suggests was at the root of the development that led to the first actions on the case based solely on words.[224] Towards the end of the 15th Century, the common law courts started to bar all ecclesiastical actions which concerned allegations of secular crimes regardless of whether the subject matter of the impugned proceeding had previously been before their purview. It is puzzling why this development occurred at this specific time but it may have been the result of a growing objection by the royal justices to the spiritual courts dealing with secular matters, the manifestation of a pre-Reformation policy to confront the power of the ecclesiastical courts and the influence of Rome. In any event, a vacuum was created in that there was effectively no remedy or sanction for false words alleging a crime at the turn of the 16th Century other than the limited number of actions that were still being brought before the local courts which, as we have seen, was a distinctively different forum. At the same time during this Tudor period, the infamous Star Chamber became active in sanctioning printers for publishing without license and, based on the statute *Scandalum Magnatum*, hearing indictments for the spreading of false rumours. Both proceedings involved the review of printed or spoken words and the punishment of speakers and publishers, a comparative precedent for the new action.

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222 Helmholtz, "Canonical Defamation in Medieval England" (1971) 15 Am. Journ. of Leg. Hist.
223 1 Edw. III, c.11, (1327).
224 Helmholtz, *Selden Society*, p. lxix-lxxviii.

Within this setting, the first common law actions for slander appeared[225] in the second decade of the 16th Century. The first causes were based specifically on words alleging secular crimes. Contrary to Holdsworth's view, damages were not the gist of the action but plead only as a symbol to affirm that the subject matter was within the jurisdiction of the court.[226] Indeed by the mid-16th Century, the action had become established and it ceased to be even customary to plead damages unless the pleader was faced with a difficult, borderline set of facts whose actionability may have been in doubt.[227] The essence of the new action was the communication of words alleging a specific crime.[228] A connection would appear to exist between the assumption of this new jurisdiction and existing jurisdiction over criminal indictments. A sanction based on the allegation of a crime was only a small conceptual step from, and would involve the same review and procedure as, an indictment determining whether a crime had been committed. This relationship was reflected in the scope of the early action whereby only an allegation of a specific indictable crime was actionable and words imputing general criminal conduct or any other character flaw fell outside the cause of action.

From our modern perspective, this action in its early stages appears offence-oriented, an adjunct to the developing "criminal" law oriented towards the maintenance of public order. There is little indication that it provided restitution and compensation for injury. On a guilty verdict being found, the plaintiff was vindicated and entitled to a limited reward and the defendant punished through the imposition of a fine or award for his ill-spoken allegations. Although it appears that the words had to be communicated to a third party to be actionable,[229] this was only relevant to the action insofar as the imputation had to be public. Social standing and good reputation was not significant unless the liberty of the plaintiff was placed in jeopardy through an imputation of a

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225 *Owughan v Baker*, Common Pleas, Trinity Term 1507, 40/981, m.596; *Sparowe v Heygrene*, King's Bench, Hilary Term 1508, 27/986, m.55d. *Ibid.*, p.42.

226 Milsom, *supra.*, note 191, p. 337.

227 Helmholtz, *Ibid.*, p.lxxix-lxxx.

228 Helmholtz has chronicled the uncertainty as to the basis of the action, *Ibid.*, p.xcix-ciii. However the number of recorded cases indicate that an allegation of secular crime was the predominant subject matter and concern of the pleaders, *Ibid.*, p.lxxvi-lxxix.

229 See the excerpt of "Reading by James Hale", *Selden Society*, Vol. 101, p. 76, dated at approximately 1537: "if no one hears this [allegation of robbery] he will not have an action, even if he alleges that he was damaged by it." Also see *Jones v. Davers* (1594), Cro. Eliz. 497, 78 E.R. 747, where words spoken in Latin were held not to be actionable because they did not appear slanderous to those who heard them.

crime. It was not until the latter part of the 16th Century that the scope of the action grew to extend a sanction for other injury arising from ill-spoken words. This happened gradually. Perhaps as a result of ecclesiastical precedents seeping into the common law, allegations of disease came to be considered actionable.[230] It would be a small conceptual step from granting a remedy for the improper allegation of a crime to doing so on the basis of an allegation of a disease since the consequences of both would obviously affect the plaintiff's liberty. In a similar approach to that seen in criminal imputations, only particular allegations imputing a specific disease, either leprosy or syphilis, were actionable and words implying general ill-health that might still touch upon an individual's character but not go any further in their harm could not found an action.

Towards the turn of the 17th Century several developments occurred which substantially broadened the cause of action. Attornies and court officials, undoubtedly familiar with the potential of the action, began to file suit against those who circulated allegations criticizing their court-related activities.[231] These imputations may have initially been considered to have been an abuse of the court and the granting of a remedy akin to contempt of court as the sanction was limited to those who fell within a particular status within the legal hierarchy. However, under this cause it was essential to the success of the action to plead and establish the profession of the plaintiff. In time as pleaders tested the ambit of this new basis for an action, the sanction was broadened from the initial narrow base of legal attornies and officials to other professions. This development came to constitute a new category of actionable words, those directed at the plaintiff's office or trade. By the early 1600's, the three categories of actionable allegations were beginning to crystalize from a mere collation of analogous pleading precedents to become recognizable forms which have remained within the action into our modern era.[232]

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230 As the common law made inroads on the common ecclesiastical jurisdiction over allegations of secular crimes, the ecclesiastical courts extended their sanctions to allegations of defects and "spiritual crimes" such as heresy, adultery, incontinence and other sins.

231 One such instance involved an action brought by Sir Edward Coke, *Coke v Baxter*, (1585) King's Bench Easter Term, 27/1293, m.322; *Caesar v. Curzon* (1592), King's Bench 27/1322, m.322. Reported in Helmholtz, *Selden Society*, p.66.

232 The categories were not precise and closed. Much uncertainty as to the actual nature of the action existed as can be seen in a brief review of an Abridgment from the period, where the focus is on the specific words used and not on any broad categories based on the content and target of the words. See Rolle's Abridgment (Un Abridgment des Plusiers Cases et Resolutions del Common Ley), (1668).

While an imputation of a crime or a disease posed a threat to the liberty of the plaintiff, an allegation directed at an individual's profession only threatened his livelihood. Therefore, the impact was primarily economic. The granting of a remedy in these instances reflects a shift in the focus of the action from the sanctioning of wrongs that could have dire consequences to the plaintiff to the compensation of an individual for that which he lost due to the act of another, the foundation of the 'civil' and tortious nature of the action. This development took firm root in the late Elizabethan period. In the same manner that the additional categories had developed through the hard case, where the plaintiff's plea was recognized when he had plainly suffered considerable injury but the source of the harm or words did not clearly fall within an existing precedent, the rule developed that any words which caused specific and measurable injury were actionable.[233] This rule relating to special damage, probably founded on a notion of just compensation and perhaps fueled by competition for jurisdiction between the various courts, greatly broadened what potentially would be considered an actionable statement. No longer was the content of the communication, the specific words used, the mark of actionability and recovery but instead the injury suffered became a dominant factor.

This development contributed substantially to the increased popularity of the action to plaintiffs. With the particular methods of proof of the day, it was not difficult to adduce evidence that some injury had occurred directly as a result of the plaintiff's ill-chosen words. Not suprisingly, the number of lawsuits for slander rose dramatically during the Elizabethan and Stuart reigns to the point where it occupied a considerable part of the Court of Common Pleas workload. The judiciary became perplexed as reflected in the words of Wray C.J.: it was not that "the intemperance and malice of men had increased as that thin skins and offended susceptibilities may be capitalized upon."[234] In order to stop the flood of cases, some measure had to be adopted to impede and deter litigants. The result, in many instances, was the application of the well-documented rule of construction, *in mitior sensus*, under which

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233 *Reston v. Pomfreict* (1598) Cro. Eliz. 639, 78 E.R. 879 (K.B.); and *Boldes v. Bacon* (1597) BL MS. Harl. 1624, f. 156v, cited in Helmholtz, *ibid.*, p.civ. But see the discussion on this point in *Holwood v. Hopkins* (1600), Cro. Eliz. 787, 78 E.R. 1017.

234 See Wray C.J. in *Stanhope v. Blyth* (1585), 4 Co. Rep. 15a, 96 E.R. 891

words, if they were capable of being interpreted in a non-defamatory manner, were deemed not actionable. The philosophy underlying this doctrine was succintly expressed by Sir Edward Coke in *Croft v. Brown* [235] when he stated that the law "will not give more favour unto actions upon the case for words than ought to, these actions being now too frequent." Although this rule was taken to absurd lengths,[236] it was a technique which both limited re-dress to specific and definite allegations of an offence, physical defect or professional incompetence[237] and also often denied re-dress where the words arose were merely abusive.

This formal restriction, to our modern mind thinking in terms of compensation and restitution, appears irrational, and in application, comical. But it can be interpreted as serving a simple and single purpose: to limit the number of defamatory actions that were proliferating. This was also acheived through several other restrictions on actionability during this period. The categories of words actionable *per se*, without proof of special damage, were interpreted narrowly.[238] Unless the plaintiff alleged special damage at the same time that he alleged that the defendant's words fell within an actionable category, he might have been left without a remedy.[239] In addition, the common law courts continued to respect the jurisdiction of the ecclesiastical courts over 'spiritual offences'. Allegations of spiritual defects, such as intemperance, adultery, heresy or promiscuity, were not remediable in the 17th Century even when accompanied by special, temporal damage.[240] As an exception to the general rule that all words giving rise to special damage were actionable, this restriction was usually

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235 (1612), 3 Bulstr. 176, 81 E.R. 141.

236 A popular example is the decision in *Holt v. Astgrigg* (1608) Cro. Jac. 184, where words alleging that the plaintiff had struck his cook on the head with a cleaver "and cleaved his head, the one part lay on the one shoulder and the other part lay on the other" were held not to be actionable because there was no allegation that the cook had been killed.

237 For an example of a formal interpretation being used to render words ambiguous and not actionable, see *Bell v. Thatcher* (1686), 1 Vent. 275, 86 E.R. 184, where Sir Mathew Hale reasoned that the words spoken of a postman should not support a cause of action or a man could not speak freely about his cook or groom. One hundred years later, this policy concerning communications by masters provided a basis for the development that we know today as the defence of qualified privilege: see *Weatherstone v. Hawkins* (1786), 1 T.R. 110, 99 E.R. 1001.

238 For instance, see *Chapman v. Lamphere* (1688), Comber. 74, 90 E.R. 352 where an allegation made of a carpenter that he was a "broken" or bankrupt fellow gave rise to much discussion over actionability as carpentry was a profession of skill and not of credit.

239 As this doctrine was most often applied on a demurrer, raising a point of law after a jury had returned a verdict, it is also possible that it was used by the judiciary as a means to control juries and overturn unconscionable verdicts.

240 For instance, see *Parret v. Carpenter* (1596), Noy 64, 74 E.R. 1032.

supported by the reasoning that the secular court could not take 'connusance' of the matter and review the substance of the allegation if truth were raised as an issue.[241] It was not until the decline of the ecclesiastical courts in the 19th Century and the contemporaneous rise in the broad liability in libel that the common law made inroads in this jurisdiction. This greatly expanded the scope of the action to allegations of mere moral defects and to words only generally disparaging of the character of the plaintiff.

Instances also arose of the plaintiff failing to obtain a remedy on the basis that the defendant's words were spoken out of heat, passion, or spleen.[242] This reasoning, in effect, created a *de minimis* principle whereby petty disputes could be dismissed.[243] These limitations on actionability, on the scope of words for which re-dress would be granted, afforded the judiciary some control over the action. Without a remedy as of right when false words were spoken, the number of disputes could be maintained to a manageable level before the courts. At the same time, the emerging form of several defences appear as a pleading bar to the plaintiff's claim. Truth was raised although it was restrictively construed. Entered as a plea, any variance in factual detail from the actual allegation was considered fatal to the defence. For instance, in *Hilsden v. Mercer* , the pleadings averred that the defendant had stated that the plaintiff "was a thief and stole 20 pounds."[244] The defendant responded with a traverse that the plaintiff had stolen two hens. On a demurrer, the court rejected the defendant's argument of truth on the basis that, although his plea may have justified the more general allegation of thievery, it did not substantiate the specific allegation of the plaintiff having stolen 20 pounds.

Although there are no early reported cases on the subject to confirm the point, a parliamentary privilege may also have existed as a bar to proceedings.[245] Several

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241 See *Daniel v. Sterlin* (1672), 81 Freeman 50, 89 E.R. 397: an allegation of 'whore'.

242 It is unclear from the reported cases whether this was a substantive doctrine in itself or merely reasoning to justify the result when words fell outside the scope of actionability. See *Trevillian & Betties Case* (1619), Palmer 9, 81 E.R. 953.

243 In *Smith v. Wood* (1693), 3 Camp. 323, 170 E.R. 1397, words of spleen were seen to be no more than words of a madman; in *Davis v. Miller* (1742), 2 Str. 1169, 93 E.R. 1105, and *Drake v. Hill* (1669), 83 E.R. 97 words of spleen were seen not to be actionable because they had caused no damage.

244 (1624), Cro. Jac. 677, 79 E.R. 586. A suspicion or belief in the truth was not a basis for avoiding liability: *Powell v. Plunkett* (1627), Cro. Car. 52, 79 E.R. 649.

245 A form of absolute privilege for Parliament can be traced back to the statute Pro Ricardo Strode enacted in 1512 by Henry VIII (St. 4 Hen. 8, c.8) rendering void any suit arising from matters in

reported cases also indicate that the plaintiff's case would fail when the words were published in legal proceedings.[246] As such, these cases resemble our modern concept of privilege. In *Cutler v. Dixon* and *Buckley v. Wood*,[247] it was determined that no action would lie for words communicated in the ordinary course of justice. The basis of the rule was said to be, in the former case, that if such words were a cause for complaint, those bringing proceedings would not complain for fear of infinite vexation. However, it should be noted that in the latter case a restriction was placed on the rule limiting the defence to words "examinable" before the court. This distinction was expanded upon in *Brook v. Montague*,[248] where it was stated that any evidence given by a counsellor not material or pertinent to an issue is not covered by the defence as "it shall be intended as spoken maliciously and without cause."[249] This reasoning suggests that the privilege may not have been dependent only on the fact of having been published within and relevant to legal proceedings, but that it may have been based on the presumption that words spoken in judicial proceedings were spoken with good intentions and without malice.[250] This view is consistent with, and would place the rule on the same footing with, the decision in *Vanspike v. Cleyson*[251] where a barrister was found not to be liable for words concerning the plaintiff's credit as the words were

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Parliament. It appears that there are no recorded cases involving a defence based on this statute which, it may be argued, is testimony to the existence of the privilege. However, the printed report of *Lake v. King* (1680), 1 Saund. 131, 85 E.R. 137, does not indicate that the statute was raised or relied on in argument. This case, concerning libelous matter printed and circulated before a Special Committee of the House of Commons, was decided on the basis that the matter was privileged as the committee was, in effect, judicial in nature and no mention was made of a parliamentary privilege. A parliamentary privilege was subsequently created under s.8 of the Bill of Rights of 1688 (1 Wm. & Mary, sess.2, c.2) suggesting perhaps that the statute of 1512 was not recognized.

246 *Cutler v. Dixon* (1585), 4 Co. Rep. 14b, 76 E.R. 886; *Buckley v. Wood* (1591), 4 Co. Rep. 14b, 76 E.R. 877; *Lord Beauchamps v. Croft* (1595), 3 Dyer 285a, 73 E.R. 639 (action on the statute of Scandalum Magnatum).

247 (1585), 4 Co. Rep. 14b, 76 E.R. 886; (1591), 4 Co. Rep. 14b, 76 E.R. 877

248 (1606), Cro. Jac. 90, 79 E.R. 77.

249 One commentator attributes this decision as being the source of qualified privilege, the defence being lost on positive proof of malice. See Brown, *The Law of Defamation in Canada*, (1987) Vol.1, p.19. However, there is no indication from the report that malice was spoken of as a substantive concept to be proved positively and not a mere presumption. Further, the limitation appears to be based on the fact that the statement is pertinent to the legal proceedings, regardless of the motive of the defendant, an aspect more germane to our modern notion of absolute privilege.

250 This view is supported by the decision in *Hodgson v. Scarlett* (1818), 1 B. & Ald. 232, 106 E.R. 86 where words spoken by an advocate in court proceedings were seen to be privileged because the words were pertinent to the issue and were spoken in a *bona fide* manner, as fair comment on the evidence, and were not spoken maliciously. "Malice" was not considered irrelevant to this setting until the decision in *Munster v. Lamb* (1883), 11 Q.B.D. 594.

251 (1595), Cro. Eliz. 542, 78 E.R. 788.

spoken not as slander but as "good counsel". In any event, these defences, other technical rules of pleading, and the interpretational doctrines mentioned above, in combination with the limits on what types of words were actionable, provide a means by which the judiciary could exercise some control over the action

It was in the mid-17th Century, with the advent of Parliamentary rule, that the common law courts assumed jurisdiction over 'libel' which had previously been within the control of the disbanded Star Chamber. Not suprisingly, considerable confusion arose in the law since this new action, while superficially similar, was considerably different in nature to that of the common law cause of slander. From the 15th Century, the Star Chamber, by virtue of its prerogative status, had supervised the licensing of printing presses, and had heard actions based on the statute of *Scandalum Magnatum* and other public order offences affecting the King's peace. In an extension of this subject matter, the action of libel was developed in the decision of Sir Edward Coke in *De Libellis Famosis* at the beginning of the 17th Century.[252] Proceedings in the Star Chamber were notoriously arbitrary and severe. A private citizen would initiate the bill procedure, but a court official would then take the complaint and prosecute it. Although damages may have been awarded, probably as an incentive for the launching of indictments, the substance of charges brought were criminal in nature in that they generally concerned the King's peace and the maintenance of public order. For this reason, the early action of libel in the Star Chamber is generally seen as being aimed at deterring the private remedy of duelling.[253]

Previous to the common law courts assuming this jurisdiction over 'libel', the distinction between libel and slander as we know it today, between oral or transient and written or permanent matter, was not divided between the two courts. Although the principal allegations before the common law courts under the action for slander were based on spoken words, there are instances of written matter being the subject of an

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252 (1605), 5 Co. Rep. 125a, 77 E.R. 250. Coke utilized sources of biblical scripture and Roman law to justify the sanction. Professor Holdsworth ascribes the founding of the action to a combination of contempt of court and the civil action based on the statute Scandalum Magnatum; see Holdsworth, *History of English Law*, Vol III, p.390.

253 Since truth was not a defence, the action was viewed as being oriented towards any objectionable allegation that might incite a reaction in the subject rather than a false allegation.

action for slander and being called slander.[254] The Star Chamber also dealt with spoken matter either under the statute of *Scandalum Magnatum* or under their royal prerogative in dealing with all matters that adversely affected the Crown.[255] Hence, the Star Chamber action of 'libel' was different not in form but only in character with its public order oriented context. Understandably, there was some confusion as to the exact purpose and parameters of the new jurisdiction and as to how it fit into the existing action of slander. The conventional view[256] is that, rather than being incorporated into the existing common law doctrine of slander, a new and separate tort of civil libel was, in essence, created within the common law in the decision in *King v. Lake* in 1670.[257] In that case, one issue amongst several that arose was whether a written document that reflected adversely upon the plaintiff's profession as a barrister was actionable *per se*, as it would have been if the words were spoken, or whether special damage had to be proven. Chief Baron Hale determined that because the words were "writ and published, which contains more malice", they were actionable *per se*.

The reasoning in *King v. Lake* was subsequently interpreted and extended to the point where all libelous matters were seen as actionable *per se* and not merely those containing imputations within the existing classifications of slander actionable without proof of damage.[258] Because such a rule was particular to libel and not slander, this development cemented the distinction that still exists in some juridictions today between libel as written communication and slander as oral communication. In the action of slander, either the content of the words or the consequences of the communication effectively provided a basis by which liability was restricted to serious imputations and controlled. Under the new action of 'libel', as all printed matter became actionable *per se*, there was no such restriction. Consequently, any printed words reflecting upon

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254 For instances of written matter being the basis of an action of slander, see *Broughton's Case* (1583), Moore K.B. 283, 72 E.R. 493 , and *Buckley v. Wood* (1592), 4 Co. Rep. 14b, 76 E.R. 88.

255 See *Edwards v. Wooton* (1607), 12 Co. Rep. 35, 77 E.R. 1316 and *De Libellis Famosis* (1605), 5 Co. Rep. 125a, 77 E.R. 250.

256 See Fisher, "A Chapter in the History of the Law of Libel", (1894) 10 L.Q.R. 158; Carr, "The English Law of Defamation", (1902) 18 L.Q.R. 255; Holdsworth, "Defamation in the Sixteenth and Seventeenth Centuries", (1925) 41 L.Q.R. 13. For an alternative view arguing that a new tort was not created, only aspects of "libel" grafted onto the common law action for slander, see Kaye, J.M., "Libel and Slander---Two Torts or One?" (1975) 91 L.Q.R. 524.

257 Hardres 470, 145 E.R. 552.

258 *Harman v. Delaney* (1731), 2 Strang. 898, 93 E.R. 925; *Villers v. Monsley* (1769), 2 Wils. 403, 95 E.R. 866.

another, regardless of the actual damage or the content of the allegation, had the potential to be actionable. In the late 17th Century, this was not however the case. The new common law action for libel retained its criminal background and nature for a short period. Although it is difficult to establish any definite principles as opinions varied, the cause of action was often granted on the basis that the words "tended to cause scandal".[259] This vague criteria, a legacy of the quasi-criminal Star Chamber background, clearly reflects the public order orientation of the action.

Although it was the attitude of the Restoration judiciary that the action should be encouraged for "unless men get satisfaction by law, [they are] apt to take it themselves,"[260] the criteria for actionability appears to have still been centred around the notion that the words must cause some public disruption and commotion. At the turn of the 18th Century, attempts were made to define with greater precision what was actionable and was not. Because the parameters on this issue were already well established within principles of damage in the case of slander,[261] it was for the most part a matter that arose in cases of libel[262] which, in effect, gave shape to our modern action of defamation founded on the notion of reputation. In 1693 in *Cropp v. Tilney*, Chief Justice Holt adumbrated this development when he stated that the libel did not have to create a scandal to be actionable, and that it was "enough if the defendant induces an ill opinion to be had of the plaintiff or makes him contemptible or ridiculous."[263] In a later case, the Chief Justice stated that as a matter of policy he would encourage any actions for words that "tended to take away a man's reputation."[264] Lord Wilmot C.J. extended and emphasized this aspect of what was to be considered defamatory in 1769 when he defined a libel as anything "which

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259 *Drake v. Drake* (1652), Style 363, 82 E.R. 780; *Terry v. Hooper* (1663), 1 Lev. 115, 83 E.R. 325; *Carver v. Pierce* (1654), Style 66, 82 E.R. 534; *Hastings v. Beaumont* (1680), 1 Bulstr. 36, 80 E.R. 740; *How v. Prinn* (1702), 2 Salk 695, 91 E.R. 588;

260 *Harrison v. Thornborough* (1714), 10 Mod. 196, 88 E.R. 691. And see *Naben v. Miecock* (1683), Skinner 183, 90 E.R. 84: "men will right themselves by force when they cannot be righted by law."

261 For instance, see *Holt v. Scholefield* (1796), 6 T.R. 691, 101 E.R. 775 where Lawrence J., in an action for slander, rejected the plaintiff's argument that the words in dispute were actionable because they caused "public infamy and disgrace" and determined that the action could not succeed because the plaintiff had failed to establish the necessary damage averment.

262 Often no distinction was drawn between the two causes in the 18th Century. By the 19th Century, principles were applied interchangeably despite the decision in *Thorley v. Kerry* (1812), 4 Taun. 355, 128 E.R. 367 which confirmed the distinction between the two causes.

263 (1693), 3 Salk. 225, 91 E.R. 791.

264 *Baker v. Pierce* (1702), 6 Mod. 23, 87 E.R. 787.

renders..[the plaintiff]..ridiculous or tends to hinder mankind from associating or having intercourse with him."[265] "Public infamy and disgrace" also became popular.[266] These comments, issued during the age of the satirist, clearly indicate a shift in the basis of the action away from the severity of the words used and their tendency to cause an impact upon public order towards the specific content of the actual words and their impact on the public impression of the plaintiff. Perhaps in distinction to the associated form of criminal libel that was often used in the 18th Century, the definition became fixed on the civil concept of an individual's reputation, his social standing and his relations with others.

The issue was however far from settled and certain. In the same case that Lord Wilmot C.J. tendered his view based on the plaintiff's relations with third parties, Bathurst J. stated that he wished that the matter was "more thoroughly gone into and solemnly determined."[267] Indeed, the subsequent history of defamatory criteria illustrates the difficulty involved in arriving at a definitive test. Both a special judicial committee assembled under the chairmanship of Lord Campbell in 1843 and the Faulks Committee of 1975 failed to reach a consensus on the matter. In slander, the problem is partly the consequence of the nature of the action: the specific imputation for the most part determines whether the words are actionable and, hence, defamatory. In libel, however, the determination is essential to defining the scope of what interest was to be protected under the law. Whatever the criteria utilized, the shift in the 18th Century to a definition based on the notion of reputation and the effect of the words on an individual's relations with others clearly constituted the foundation of the modern civil remedy premised on injury to reputation. From "causing hatred, ridicule or contempt" to "discredit" to "lowered estimation", this progression reflects the development of the action to a remedy primarily oriented towards compensation for any and all harm to reputation.

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265 *Villers v. Monsley* (1769), 2 Wils. 403, 95 E.R. 886.
266 *Holt v. Scholefield* (1796), 6 T.R. 691, 101 E.R. 775.
267 *Ibid.*

CHAPTER IV

Although some opinions have been expressed to the contrary,[268] it is conventional wisdom that defamation has always, from its inception, been a tort of strict liability.[269] Under this view, the defendant's intentions have always been seen as irrelevant to the cause of action. 'Malice', as a term denoting either a direct or implied intention to harm, did not constitute a substantive concept within the law until the early 19th Century when it was determined that it was only relevant to liability after the defendant had initially established that he was justified in publishing his communication. No circumstances outside of the simple issues---were the words set out in the declaration actually published as alleged and did they relate to the plaintiff[270]---complicated the determination to be made at trial from which the legal question---were the words published actionable---would arise.[271] Although the term 'malice' may have crept into the common law from ecclesiastical precedents at an early stage, it was merely a term habitually used in pleading and of no other significance.[272] It follows that the only determination encompassing an issue of responsibility was deciding whether the words were actionable *per se* or whether special damage had to be proved.[273] This perspective, that liability was not premised on a complicated principle

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268 Wright & Linden, *Canadian Tort Law: Cases, Notes and Materials*, (7th ed., 1980) at 16-24 cite Veeder, "The History of the Law of Defamation", (1904) 4 Col. L.R. 33 as suggesting that malice "used to be required". However, Van Veeder, at p.36, suggests only that the term crept into the common law from ecclesiastical precedents and is of the view that it was presumed even in the early action.

269 Holdsworth, "Defamation in the Sixteenth and Seventeenth Centuries", (1925) 41 L.Q.R. 13 at 24-25 and in *A History of English Law*, Vol. VIII, p.371 [illegible]; and see the comment of Richards J. in *Coates v. The Citizen et. al.* (1988), 44 C.C.L.T. 286 at 296, citing *Carter-Ruck on Libel and Slander*, (3rd. ed., 1985) p.22.

270 What is known as the 'colloquium' initially involved the issue of whether a connection existed between the words spoken and the special damage incurred. It was often accompanied by the *per quod* pleading which outlined how or 'whereby' the plaintiff suffered damage.

271 The defendant could raise as a bar to the plaintiff's pleadings one of the emerging defences, either justification in the form of truth or an early form of privilege, which would create a further issue.

272 See Veeder, *supra.*, note 269 at 35.

of responsibility but on a more primitive understanding of causation,[274] fits neatly into the historical conception of general principles of tort law.[275] It forms the basis of the view that a publisher has always, since the earliest days, been held strictly accountable for the consequences of his act, regardless of his intentions or culpability, and has led to the assumption that a certain "universal value" lies behind the present strict standard of liability in defamation.

However, despite such an apparently comprehensive theory, there are contrary indications that the term 'malice' was a factor within the early action and did to a certain degree hold some meaning. Printed reports, pleading customs, and the plea rolls all contain material that collectively supports the view that evidence of the circumstances surrounding the publication was presented to the jury until the 19th Century. Even though our understanding is limited by the documentary sources available, it would appear that this introduction of the circumstances and context of the publication influenced the jury and may often have led to a verdict in favor of the defendant. These factors were often referred to under the general rubric of 'malice' or 'lack of malice'. Although a definite principle or rule centred upon this concept never clearly emerged, this indicates, at the very least, that defendants to a libel or slander action prior to the 19th Century were not uniformly held strictly accountable for their communications. It was only in the 19th and early 20th Century when rules were established restricting the review of these issues by the jury and in turn their consideration in determining liability that a higher level of responsibility was instituted within the action. Accordingly, strict liability contrary to conventional assumptions is a fairly recent phenomenom.

The cases that have commonly been relied on to support the view that it was not necessary to prove malice in the early action, when examined closely, only relate to principles concerning the plaintiff's pleadings. No reference is made to proof and the evidence that would be submitted to the jury to support a determination in support of

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273 The principles appear to have been based on the consequences presumed to have risen from the type of words used which, in effect, would create different levels of responsibility for different types of communication.

274 The gradual clarification of categories under which words were actionable *per se*, that is without proof of damages, in itself constitutes a presumption not only of causation but also responsibility.

275 See generally, Wigmore, "Responsibility for Tortious Acts", (1894) 7 Harv. L.R. 315; Gregory, "Trespass to Negligence to Absolute Liability", (1951) 37 Va. L.R. 359; Malone, "Ruminations on the Role of Fault in the History of the Common Law of Torts", (1970) 31 La. L.R. 1.

the plaintiff or which might defeat an award for the plaintiff. Although the plea in the plaintiff's declaration played a much more significant role in the trial process in the early action than a pleading in our modern period, decisions based on necessary averments only reflect indirectly on events at trial and the jury's determination. The decision in *Mercer v. Sparks* [276] is most often raised to suggest that malice was not an essential component in the action. In this case, the defendant unsuccessfully argued on a writ of error that the plaintiff's failure to allege in his declaration that the words were spoken with 'malitiose' was fatal. Although it is often suggested that this indicates that malice was always presumed throughout the action,[277] the actual decision by the King's Bench in this case, a motion *en banc* , was that malice was evident from the words themselves. At most, this can be considered authority for the principle of pleading that it is not necessary to plead malice if malice is apparent from the words themselves. More likely though, it reflects the view that in certain instances the intention of the speaker could be inferred from the tone and tenor of the words.[278]

This interpretation would explain the subsequent appearance and referrence to 'malice' found throughout other documentary sources. Despite this allegedly ancient authority,[279] attornies constantly averred in the 17th and 18th Centuries that the defendant "falsely and maliciously" and with intent to cause harm spoke the actionable words. If there was no significance to be attached to these words, it is puzzling why they were continuously used. Professor Holdsworth has suggested that this merely constituted a "ritual of pleading", enhancing the plaintiff's case and was not in any manner substantive. It is true that, even today, unsubstantiated allegations of malice are included in pleadings to both emphasize claims and damage awards.[280] However, the very presence and continued use of the term in pleadings despite the apparent rule rising

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276 (1586), Owen 51, 74 E.R. 892; and *Anon* (1652), Style 392, 82 E.R. 804.

277 See *Bromage v. Prosser* (1824), 1 Carr. & P. 475, 171 E.R. 1280; (1825), 4 B. & C. 247; 107 E.R. 1051.

278 This 'assumption' would be very similar to that incoporated into the law concerning the actionability of words. Slander *per se* is rooted in the common belief that certain types of words cause certain damages whatever the context for speaking.

279 See *Bromage v. Prosser*, *ibid.*, where this case is relied on to suggest that malice has always been presumed.

280 In the modern action, the pleading is often asserted in anticipation of the defendant's plea of qualified privilege or fair comment. This "ritual" can work to the plaintiff's or the defendant's disadvantage. See the decision of Master Sandler in *Bennet v. Gage Educational Publishing Ltd.* (1980), 16 C.P.C. 241 where the defendant, by pleading that he had not intended to harm the plaintiff, opened up his intentions and hence his sources to examination by the plaintiff.

from *Mercer v. Sparks* suggests this decision carried little weight amongst practitioners.[281] It is possible that in the same manner that truth, from the 16th Century onwards, was a bar to the plaintiff's action and only became recognizable as a substantive defence in 1737 when it was determined that the bar had to be specially plead,[282] lack of malice in speaking the words was an issue in the action which never reached a similar status in being recognized as a singular basis for relieving the defendant of liability.

This view would at least explain its continued use on the plea rolls. It also is consistent with the interpretation that it may not have been necessary for the plaintiff to plead malice, but it may have been acceptable for the defendant to justify his action by raising the issue thereby placing the matter in doubt and opening up the facts surrounding the circumstances under which the statement was published. This in turn might support a finding by the jury that the words were spoken without malice. Several alternative printed reports support this view. In *Greenwood v. Prick*,[283] a parson delivered a sermon, based on an account from *Fox's Book of Martyrs*, relating how the plaintiff had contracted the plague and died after committing perjury. The plaintiff was in the audience and the tale was obviously false, becoming the basis of an action for slander. Wray C.J. at trial directed the jury to find a verdict of not guilty as the words were spoken as a story and without "any malice or intention to slander." Although the report is not clear as to whether the lack of malice is reasoning used to justify the non-actionability of words spoken by way of a story or an actual ground and rule for exempting liability, the fact that this decision was cited in another case to support the argument that words spoken in legal proceedings were not actionable would

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281 For instance, see *Bendish v. Lindsay* (1709), 11 Mod. 193, 88 E.R.98 where it was held that the plaintiff needn't expressly deny the defendant's pleadings because the original plea that the words were spoken 'falsely and maliciously' was sufficient. This would indicate that this ritual was more than habit and an anticipation of the defendant's response that he spoke without malice.

282 In *Smith v. Richardson* (1737), Willes 20, 125 E.R. 1034, eight of twelve judges were of the view that evidence of truth should not be admitted to mitigate damages on the basis, *inter alia*, that the plaintiff would be taken by surprise and such evidence may amount to a plea in bar of the action, thereby circumventing the rule that truth had to be specially plead. Also see *Underwood v. Parkes* (1744), 2 Str. 1200, 93 E.R. 1127.

283 This case is cited by Sir Edward Coke in the reported case of *Brook v. Montague* (1606), Cro. Jac. 91, 79 E.R. 78. It appears to have been decided by Wray C.J.K.B. and affirmed by Popham C.J.K.B. and thus probably dates from shortly before the turn of the 17th Century.

indicate that, at the very least, that "lack of malice" was a unifying concept for a bar to the plaintiff's action in either factual setting.[284]

Further support for this view can be found in a decision in 1611,[285] where a verdict against a minor was upheld on the basis that malice supported the action and was presumed to have been found by the jury. Moreover, in a text published in 1647, the author March also refers to a case where the jury's finding in favor of the plaintiff on the basis that the words were spoken falsely and injuriously was overturned because malice was not also found.[286] These latter two reports go so far as to indicate that there may have been an emerging rule that in certain situations malice was a positive burden for the plaintiff to sucessfully establish to make his case. The decision of Twysden J. and Alleyn J. in *Crawford v. Middleton*, decided in 1674, is also consistent with this view.[287] They held that, when the alleged words were phrased as a report from a third party, it was not necessary for the plaintiff to establish that the words originated with the defendant and not the third party as the plaintiff had averred and established that they were spoken "falsely and maliciously" by the defendant.

Research into court manuscripts and pleading records by Professor Helmholtz has also revealed that, in the 17th Century, matter was consistently submitted to the jury under a special plea or traverse containing circumstances that surrounded the speaking of words.[288] Under this plea, the defendant conceded speaking some words but, in order to avoid a direct admission, expressly pled that the words he actually spoke varied from those words set out in the plaintiff's declaration. Significantly, this then afforded the defendant the opportunity to set out additional facts establishing the circumstances in which the words were actually spoken. The pattern of these special facts are diverse in nature, but several constant matters advanced were that the defendant made his allegation with a basis or ground for his belief, the occasion

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284 See Chapter III, p. 60 , where the early concept of privilege is discussed.

285 *Hodsman v. Griswell* (1611), Noy 129, 74 E.R 1092.

286 The author draws the conclusion that "if the words were not spoken maliciously, no action will lie." March, *Actiones for Slaunder* (1647), p.122, cited in Holdsworth, "Defamation in the Sixteenth and Seventeenth Centuries" (1925) 41 L.Q.R. 13 at 26.

287 1 Lev. 82, 83 E.R. 308. The majority held the plaintiff's declaration bad on a pleading technicality, that the plaintiff had failed to aver that the defendant was the originator.

288 Helmholtz, R.H., "Civil Trials and the Limits of Responsible Speech" in *Juries, Libel and Justice: The Role of English Juires in 17th and 18th Century Trials for Libel and Slander* (1984).

warranted the speaking of the words or that the defendant had been provoked into making his allegation by the plaintiff's.act.[289] In general, this evidence can be considered as constituting "excusing facts", that the defendant spoke the words for a good reason and without an improper motive.[290] The jury then would be in a position to make a determination of fact, finding that the defendant's version of the words were the actual words spoken and not actionable under general principles of what constituted actionable words or, although actionable words, were not so in the instant case because of the excusing circumstances.

This method by which evidence of an excuse could be placed before the jury established a means, it would appear, for obtaining a determination on the basis of the relative culpability of the defendant. With the demise of the special traverse due to a transition in pleading customs in the latter part of the 17th Century,[291] these matters which were previously specifically plead became submerged within the general issue which entailed a general denial by the defendant of having spoken the alleged words. Although clear evidence of this continued practice is obscured by the blunt traverse on the pleading rolls, it appears that it continued. The printed reports, which primarily concern matter raised through the form of appeal in that period,[292] contain comments of the bench which confirm this.[293] In *Peake v. Oldham*, Lord Mansfield in the course of his judgment stated that if the words were found to be "innocently spoken, the jury might have found a verdict for the defendant.".[294] Blackstone, in his *Commentaries*, also speaks of "words spoken in a friendly manner without any tincture or

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289 *Ibid.*, p.12-13. Professor Helmholtz also identifies a third pattern, that the words were spoken in a judicial proceeding, which obviously corresponds to the emerging cases of privilege. The fact that such words continued to be litigated would suggest that the rule of privilege attaching to words spoken in such proceedings was by no means settled or clear at this time.

290 *Ibid.*, pp.12-17.

291 Professor Helmholtz suggests that the custom may have become less popular because the same defence could be advanced through the general issue and the special traverse would disclose the nature of the defendant's defence at an early stage of the proceedings. It may also be that the plea, which was an admission of having spoken some words but not those set out in the plaintiff's declaration, would not have fit well into an action for libel where there would be documentary evidence of the exact words spoken. *Ibid.*, pp.7-8.

292 As "malice" was a question of fact to be determined by the jury, it would rarely be an issue on appeal. It appears that Professor Holdsworth's view as to implied malice is based to a certain extent on the assumption that the same determinations to be made by the jury in the criminal action where also to be made in the civil action.

293 Either a demurrer or an application for a rule *nisi* or to show cause why a rule should not be granted.

294 (1775), 1 Cowp. 275, 98 E.R. 1083.

circumstances of ill-will" as not being actionable as they are not "maliciously spoken which is part of the definition of slander".[295] Corroboration can also be found in the development of several rules concerning practice and procedure. An appellate court presumed for the purposes of appeal that, if a verdict had been returned for the plaintiff, malice had been found by the jury.[296] Rules also developed concerning what evidence was admissible to establish the "manner and occasion"[297] whereby the words were published in addition to the "spirit and temper" or "animus"[298] with which the words were spoken. Both imposed restrictions on the submission of evidence of the intention and motivation of the defendant and the circumstances under which the words were spoken, an indication of the relevancy of these matters.[299]

These different sources---pleading practices, rules of appellate review, academic and judicial comments---all indicate that liability was less than strict in the 17th and 18th Centuries. Although it cannot be unequivocally stated whether 'lack of malice' was considered a bar or defence to the action, or a burden that the plaintiff had to disprove after the defendant had raised the issue, it is at least clear that a certain amount of free communication was tolerated and defamatory statements left unremedied during this period. Some reports suggest that malice was an element that could be inferred from the absence of an adequate reply from the defendant contesting the plaintiff's case. Lord Mansfield commented in *Edmondson v. Stephenson*[300]:

> "The gist of it [the action] must be malice which is not implied from the occasion of speaking, but should be directly proved. But if without ground, and purely to defame, an action would lie."

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295 Blackstone, W., *Commentaries*, Vol. III, p.124.

296 See the judgment of Lord Wilmot C.J. in *Villers v. Monsley* (1769), 2 Wils. K.B. 403, 95 E.R. 886 where the Chief Justice states that "we must take it to have been proved at trial that it [the libel] was published by the defendant maliciously."

297 See *Smith v. Richardson* (1737), Willes 20, 125 E.R. 1034 where the issue determined was whether truth was admissible as evidence going to the manner and occasion of speaking the words.

298 See *Maud v. Daubigny* (1792), Peake 168, 170 E.R. 117.

299 The habit of plaintiffs introducing the malice of the defendant may have been more than an attempt to increase damage awards. It may have been a response to issues that defendants were raising.

300 Bull N.P. 8; cited by Lord Ellenborough in *Hodgson v. Scarlett* (1818), 1 B. & Ald. 233, 106 E.R. 86.

This would seem to indicate that if the defendant did not raise any issues through pleading to dispute the plaintiff's declaration,[301] the words themselves would by implication be seen as malicious[302], a consequence of common rules as to actionability and as to falsity,[303] a presumption that arose on the failure of the defendant to plead justification.[304] But if an extenuating fact was raised, the issue would be placed before the jury. An inference of malice when there is no evidence to the contrary is significantly different than implied malice which suggests that evidence to the contrary is irrelevant.[305] The significance of the distinction rests on the point or grounds on which the inferral is to be removed and on what basis, or in the words of Lord Mansfield on what 'occasion', is the malice of the defendant to become relevant to establish liability.

The specific meaning of 'lack of malice' is also less than clear. The term 'malice' has had a chequered legal history, being both imprecise and obscured by the common meaning--spiteful or intentional infliction of injury--as opposed to the legal definition. In the context of defamation in the 18th Century,[306] its meaning does not appear to have been definite. Rather, as a matter to be determined by the jury, it may have been necessarily loose and used more as a descriptive term to describe the result of their verdict. It is possible that evidence going to establish a lack of malice involved matter as diverse as the circumstances of the publication, the setting or occasion on

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301 See *Ceeley v. Hoskins* (1638), Cro. Carr. 509, 79 E.R. 1039: "it shall be taken that [the] words [are] spoken maliciously unless foreign intendment be discovered or shown in the pleading."

302 This view is supported by the dictum of Lord Mansfield in *Hargrave v. Le Breton* (1769), 4 Burr. 2443, 98 E.R. 269 where he stated that express or inferred malice was a necessary component of the action. Further, see Lord Kenyon C.J. in *R. v. Lord Abingdon* (1794), 1 Esp. 226, 170 E.R. 337 where he states: "but where the libel is unexplained...the jury should judge from the overt act and should infer malice."

303 This included establishing any necessary facts to support the colloquium or innuendo if the words were not libelous or slanderous on their face.

304 See the comment of Lord Ellenborough in *Roberts v. Camden* (1807), 9 East. 93, 103 E.R. 508: "...the malice [must be rebutted] which is necessarily inferred from making a false charge of this kind..."

305 This was the actual effect of the decision in *Bromage v. Prosser* (1825), 4 B & C 247, 107 E.R. 1051.

306 It may very well have been that trial practice and the specific issues presented to the jury varied between libel and slander in the 18th Century. Because of its affinity to the criminal form and the general view that printing was potentially more injurious, responsibility for libel may have been more restrictive.

which the words were published,[307] the reasons for publishing and the intentions of the defendant in benefitting the plaintiff or a third party with his communication,[308] or the belief of the defendant in the truth of what he spoke or the fact that he was merely repeating a rumour heard elsewhere.[309] Evidence of any one of these matters might form the basis for a conclusion that the words were spoken without malice or with *bona fides*, unless the plaintiff proved that malice was present. Although the lack of definitive meaning may suggest that it was an illusory concept, the fact that the various exonerating factors were collated under the notion that such evidence indicated that the defendant lacked malice makes it more likely that some significance was attached to the term centering on the notion that the defendant had no intention to harm or defame the plaintiff.[310]

The subsequent development of doctrine in the late 18th and early 19th Centuries for the most part involved the delineation of fixed rules categorizing instances when the defendant's communication was considered justifiable. As these occasions crystalized, rules in turn further developed defining, restricting and limiting the relevancy of the defendant's intentions in these instances.[311] It appears the initial development took its early form from the existing elements of the action.[312] A bar existed, from the 16th Century onward, denying recovery for words that were published in judicial proceedings. Unlike the defence of truth which would give rise to issues and facts quite separate from the occasion that the words were spoken on,[313] evidence that the words were spoken in a judicial proceeding did not have to be specially plead and was submitted with other matter concerning the circumstances of the publication under the general issue. As such, this rule barring recovery when words

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307 This would include the early cases which resemble our concept of privilege because the occasion was seen to justify the communication. See *Ram v. Lanley* (1632), Hutton 113, 123 E.R. 1139.

308 *Van Spike v. Cleyson* (1595), Cro. Eliz. 541, 78 E.R. 788.

309 This aspect may have been based on *dicta* of Sir Edward Coke in the *Earl of Northumberland's Case* (1613), 12 Co. Rep, 77 E.R. 1407.

310 The expression that "malice was the gist of the action" also became common during the 17th Century. See *Hargrave v. Le Breton* (1769), 4 Burr. 2422, 98 E.R. 269.

311 The fact that the bar to liability was centred partly on the intentions of the defendant is well-illustrated by the division posed within early texts, malice-in-fact as opposed to malice-in-law. See Starkie, Thomas, *A Treatise on the Law of Slander and Libel* (2nd. ed., 1830)

312 It should be noted that the distinction that is made today between absolute and qualified privilege, the defendant's intentions being irrelevant to the former but a requirement of the latter, was not clearly recognized until the mid-19th Century.

313 See the reasoning of the majority in *Smith v. Harrison* (1737), Willes 20, 125 E.R. 1034.

were spoken in a recognizable setting, formed a precedent for precluding recovery when an analogous occasion was also seen to be justifiable.[314] An early instance of this rule being extended to a new occasion involved the relationship of master and servant. Towards the latter part of the 18th Century a practice of the bench developed whereby the jury at *nisi prius* was directed to acquit the defendant master when his former servant brought an action for critical words published in providing a reference.[315]

In *Weatherston v. Hawkins*,[316] a case decided in 1786, this custom was confirmed on a reserved case. Lord Mansfield C.J. was of the view that there had been no publication as the words appeared to have been only an incident of an application to the defendant for a reference.[317] The emerging nature of this rule can be seen in the fact that it was initially phrased as a matter of no publication, an existing concept within the action. In the Chief Justice's opinion, there was a "necessary and implied justification from the occasion".[318] Buller J. adopted a similar position that the circumstances of the case formed an exception to the general rule placing the onus of pleading and establishing truth on the defendant. Both Justices were in agreement that the plaintiff had to prove both falsehood and malice in the face of the "occasion" and had failed to do so. Given that the defendant had raised an issue of justification, the plaintiff was unsuccessful as he had failed to establish malice or falsehood. In time, specific instances other than master and servant cases came to be recognized whereby it was assumed that the defendant spoke with good intentions.[319] In *Haver v.*

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314 The notion that words spoken in judicial proceedings were privileged in an absolute manner, without regard to the motivation of the defendant, was not recognized until the mid-19th Century.

315 *Edmondson v. Stephenson*, Bull. N.P. 8 cited in *Weatherstone v. Hawkins* (1786), 1 T.R. 110, 99 E.R. 1001. It is reported that in that case Lord Mansfield stated that it had been "held more than once that an action will not lie by a servant against a master for words spoken in giving character."

316 (1786), 1 T.R. 110, 99 E.R. 1001.

317 The term, "no publication", may have been a fiction based on the fact that the primary denial when the defendant submitted matter under a general issue was that he had not spoken or published the words. Thus, any verdfict for the defendant under the general issue may have been phrased as a matter of "no publication".

318 *Ibid.*

319 It is interesting to note the argument of counsel for the plaintiff in *Weatherston v. Hawkins*, *ibid.*, suggesting that malice was implied and publication of a libel to the plaintiff alone would suffice. This is a rule that existed in the criminal indictment at the time and indicates the close proximity of the two forms. Lord Mansfield C.J., although accepting that counsel had correctly stated the law, went on to recognize privileged communications, a principle that never took hold in the criminal form.

Dawson,[320] words concerning the solvency of the plaintiff spoken to a friend, "not out of malice but in confidence and friendship and by way of warning", were seen not to be actionable; and in 1790 in *Dibdin v. Swan*,[321] Lord Kenyon maintained that "the editor of a public newspaper may fairly and candidly comment on any place or species of public entertainment" as long as the criticism was without malice and did not exceed the bounds of a fair opinion.[322] These two cases, widely different in context in that the one dealt with a limited, confidential publication and the other publication to a public audience, share a common foundation in that the extent of the publication was deemed appropriate given the subject matter or content of the communication. In both instances, the words were seen to be spoken with good intentions because of the appropriateness of the occasion and the failure of the plaintiff to prove that the communication was excessive or malicious.[323]

There are also other instances of defendants avoiding liability on the basis that they were not 'responsible' for injury caused to the plaintiff during this period. It became popular for defendants in actions of slander, where it was necessary to prove special damage, to argue that the plaintiff's damages were not the result of their words.[324] If it was found that the defendant's damage had been caused by the act of a third party, which would often be the case in the context of special damage, the

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320 Bull.N.P. 8 cited by Chamber J. in *Roger v. Clifton* (1803), 3 Bos. & Pul. 587, 127 E.R. 317. The decision in *Vanspike v. Cleyson* (1595), Cro. Eliz. 542, 78 E.R. 788 would have formed an analogous precedent for this decision.

321 (1793), 1 Esp. 28, 170 E.R. 269. For an earlier case concerning an individual's entitlement to openly discuss a public candidate without censure which was decided on a procedural point, see *Onslow v. Horne* (1771), 3 Wils. K.B. 177, 95 E.R. 999. It is interesting to note that the plaintiff's argument on the application for a rule *nisi* was based on the notion that the plaintiff, as a public representative, was a "servant" of the defendant, an attempt to bring the present facts into line with existing precedent as much as an elementary constitutional construct.

322 These early cases concerning the right to express a fair criticism were clearly perceived as being an aspect of the general privilege running through the law because of the notion that the defendant was exercising a public duty: see Starkie, Thomas, *A Treatise on the Law of Slander and Libel* , *supra*., note 311, pp.304-314.

323 That the subject matter justified the communication and evidenced the good intentions of the defendant can also be seen in *Barbaud v. Hookham* (1804), 5 Esp. 105, 170 E.R. 754, a case involving a statement concerning the character of the French plaintiff made to a local militia committee when a state of war existed between England and France. Also see *Delaney v. Jones* (1802), 4 Esp. 191, 170 E.R. 687.

324 Stemming from *dictum* of Lord Eldon C.J. in *Morris v. Langdale* (1800), 2 Bos. & Pul. 284, 156 E.R. 1284. In that case, where a new trial was directed after the plaintiff had been non-suited on a pleading technicality, the Chief Justice suggested that if the plaintiff's damage consisted of lost contracts then he more correctly had a remedy against the party to the contract as opposed to the defendant.

damages would be considered too remote and not remediable. For instance, in *Vicars v. Wilcocks*,[325] Lord Ellenborough C.J. refused to set aside a non-suit on the grounds that the plaintiff's damage, his dismissal by his present employer and the refusal of another employer to hire him, was not the "legal and natural" result of the allegation of thievery spoken by the defendant.[326] Rather, in the view of the court, the plaintiff's damage was the result of his wrongful dismissal by his employer and the "concurrent" decision of the prospective employer not to hire him. Attempts were also made to rely on a rule arising from a Star Chamber decision in the 17th Century, the *Earl of Northumberland's Case*.[327] Under this precedent, the defendant could avoid liability if he could establish that in speaking, he had first clearly identified that the defamatory imputation was a report heard elsewhere, and second, identified the source of the rumour so as to give the plaintiff a cause of action against the originator.[328] Its logic was alligned with literal truth: the defendant, if successful, was merely establishing that he had actually stated no more than that the defamatory imputation had been reported elsewhere, and that he was not the originator of the rumour or imputation.[329] Although restricted to slander,[330] it fell out of favor since repeated statements could be as harmful as or more harmful than original reports, depending upon the context and extent of publication.[331] However, the appearance of such arguments at the turn of the 19th Century clearly indicates that lawyers were directing the bench's attention to relative responsibility.

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325 (1806), 8 East 1, 103 E.R. 244.

326 "Natural consequence" became a more popular criteria: see Lord Denman C.J. in *Gillet v. Bullivant* (1846), 7 L.T.R.(O.S.) 490. The decision in *Vicars v. Wilcocks* was criticized and doubted by Lord Campbell L.C. and Lord Wensleydale in *Lynch v. Knight* (1861), 9 H.L.C. 590 at 600-01.

327 (1613), 12 Co. Rep. 132, 77 E.R. 1407. The accuracy of this original report, published posthumously by an editor from Sir Edward Coke's personal papers, was doubted by Holt C.J. in *Lewis v. Walter* (1821), 4 Barn. & Ald. 614, 106 E.R. 1058. The source of this uncertain rule clearly lies in the statute of *Scandalum Magnatum* whereby the spreader of a false report was to be jailed until the originator was discovered.

328 *Davis v. Lewis* (1796), 7 T.R. 17. The defence was restrictively interpreted: *Maitland v. Goldney* (1802), 2 East. 426, 102 E.R. 431.

329 On this basis, the defence was raised by newspapers sued for the publication of a report of legal proceedings.

330 *Maitland v. Goldney* (1802), 2 East. 426, 102 E.R. 431; *De Crespigny v. Wellesley* (1829), 5 Bing. 392, 130 E.R. 1112.

331 In *M'Pherson v. Daniels* (1829), 10 B. & C. 269, 109 E.R. 448, the application of the rule was rejected on a technical point of pleading. In *Bennet v. Bennet* (1834), 6 Carr. & P. 588, 172 E.R. 1377, it was seen to be a matter that was only relevant to mitigation of damages and not a substantial defence.

This development took hold during the tenure of Lord Ellenborough as Chief Justice of the King's Bench in the first two decades of the 19th Century. The basis for relieving the defendant of liability because of his lack of specific intention to cause injury became even more broadly recognized.[332] The critic's entitlement to comment freely to the public was extended to books and literary works in two cases in 1807,[333] on the basis that unless malice could be established the criticism was fair.[334] In *Dunman v. Bigg*,[335] the bar was applied to communications arising from a commercial context. The defendant brewer, who had "promised" the surety of the plaintiff that he would inform him of any default in the plaintiff's payments for goods, used excessive words in describing the plaintiff's conduct to the surety. Lord Ellenborough was of the view that, because of this promise and contractual obligation, the statement was a "privileged communication"[336] and the defendant had a right to state what he actually thought. In the same term, similar reasoning, that words were not actionable when made under the impression that they were well founded, was applied to another business setting, a communication from the defendant to his banker concerning the conduct of the plaintiff, the bank's agent. Through these cases, which involved words spoken as criticism or under a contractual duty or a general sense of propriety, no single thread can be found other than the defendant had not intended to harm the plaintiff and was speaking with *bona fide* good intentions.

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332 Although it is beyond the province of this paper, it is clear that the historical conditions of the day, such as the emerging concepts of democratic rights exemplified by the French Revolution, the rise of a general reading public, the emergence of a popular press and the "newspaper" from the 18th Century tabloids and broadsheets, and the subsequent political atmosphere of England during the Napoleonic wars undoubtedly influenced these developments.

333 *Tabart v. Tipper* (1808), 1 Camp. 350, 170 E.R. 981; *Carr v. Hood* (1808), 1 Camp 354N, 170 E.R. 983. Both case were determined on the basis of the motivation or intention of the defendant that could be inferred from the tone and content of the criticism. These cases, which with *Dibdin v. Swan* (1793), 1 Esp. 28, 170 E.R. 269, form the root of of the defence of fair comment, were also predicated on the notion that the comment must be restricted to a public matter and should not extend to the private character of the plaintiff.

334 In *Tabart v. Tipper, ibid.*, the defendant was held liable to pay damages of 1 shilling because his satirical comments incorrectly attributed the publication of specific poems to the plaintiff. Although this was only considered to be evidence that the defendant's comments were not "fair", this aspect was later seized upon as authority for the proposition that the defendant's comments had to be based on true facts.

335 (1808), 1 Camp. 267n., 170 E.R. 953n.

336 This is one of the earliest instances of the use of the phrase "privileged" to descibe a communication which was not actionable regardless of intention.

This point is well illustrated in the case of *Fowler v. Homer*, decided in 1812.[337] The defendant shopkeeper had made an allegation of theft by the plaintiff to a bystander. This was considered to be justifiable as it was made with a belief in its truth, without any intention to defame and it had not been circulated to a wide audience. In the view of Lord Ellenborough C.J., the defence was warranted so as to enable the defendant "to get to the truth" of the matter, and make allegations to effectively protect his property. The belief of the defendant in the truth of his allegation and the fact that the communication was not widespread or "maliciously calumniated" formed the basis for the justification and the corresponding presumption that the words were spoken without malice. Rather than any one element, the various factors collectively represented good intentions. This approach had been taken even further in a decision in 1807, when Lord Ellenborough C.J. non-suited the plaintiff on the basis that it had appeared in evidence that the defendant, who had called the estate trustee plaintiff a "thief", had used the term loosely and had not "intended" to impute the commission of a felony.[338] Although the words were not circulated widely, it is significant that the Chief Justice based his decision on the lack of intention to defame and not the confidential setting, and went so far as to hold that he did not believe that the matter warranted review by the jury.[339]

The jury's role played a significant part in the early formulation of rules. If the defendant introduced evidence of the circumstances under which the words were spoken, the issue of malice would arise which would be a matter for the jury to determine.[340] If the issue did go to the jury on the submission of facts suggesting a lack of intention to harm, unless the plaintiff could establish other evidence---the extent of the publication, the obvious falsity of the statement, some previous act of the plaintiff---to contravert the defendant's evidence, the defendant would not be held

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337 (1812), 3 Camp. 294, 170 E.R. 1387.

338 *M'Dougall v. Claridge* (1808), 1 Camp. 267, 170 E.R. 953; and see *Dunman v. Bigg* (1808), *ibid.*

339 See also *Smith v. Carey* (1813), 3 Camp. 461, 170 E.R. 1446; and *Penfold v. Westcote* (1806), 2 Bos. & Pul (N.R.) 335, 127 E.R. 656, where Sir James Mansfield C.J. in determining not to overturn a verdict for the plaintiff commented that the jury must have concluded that the defendant intended to impute a charge of felony.

340 For instance, see *Wilson v. Stephenson* (1816), 2 Price 282, 145 E.R. 97 where the Court of Exchequer refused to overrule the jury's finding of no malice when it was apparent that the allegation of being a murderer was spoken by the deceased's brother after a fatal accident with a cannon.

legally responsible for any harm.[341] The bench was clearly losing control of the action without governing principles to restrict the issue to be presented to the jury. A non-suit was the only means by which a determination could be controlled, but could only issue in very limited and specific instances.[342] It appears that this factor greatly influenced the development of rules determining when a communication was privileged.

This trend during the first part of the 19th Century towards a broad base for free communication did not last long. Limitations on liability through the imposition of strict principles of causation in slander or the specific phrasing of words were not sound and could, in practice, produce unjust results. Furthermore, the basis of the emerging defence of *bona fides* or 'lack of malice' was not entirely clear. The significance of the falsity of the statement, the extent to which the defendant believed in the truth of his statement and had grounds for believing in its truth, the temper or phrasing of the statement, the extent to which it was published, and the background to the making of the statement were the subject of differing views amongst the judiciary.[343] The concern over the uncertainty is reflected in the action of Lord Brougham who sought in 1816 to introduce a Bill before Parliament which would render any words in any way injurious actionable, regardless of extenuating factors.[344] The Bill did not pass.

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341 The rules of evidence that developed concerning the submission of such matter by the plaintiff directly reflect that it was deemed important, most probably to refute the defendant's evidence of 'lack of malice' or justification. When malice became seen as irrelevant to liability, these rules of evidence became rules on damages.

342 For example of a case where the bench determined not to overturn a verdit of 'no malice' returned by the jury, see *Wilson v. Stephenson* (1816), *ibid.*

343 The variety of opinion as to the basis of this justification is illustrated by the variety of opinions expressed by the court in another master and servant case, *Rogers v. Clifton.* (1803), 3 Bos. & P. 587 , 127 E.R. 317. The defendant who had formerly employed the plaintiff wrote an unsolicited letter to the plaintiff's prospective employer alleging that the plaintiff had conducted himself improperly while in the defendant's employ. Lord Alvanly C.J., expressing an opinion similar to that of the court in *Weatherston v. Hawkins*, *supra.*, note 316, maintained that because of the particular context of master and servant, it was for the servant's general benefit that masters should give references and the onus was on the servant and plaintiff to establish the falsity of the allegation. Chambres J. disagreed and held that because the statement had been made "officiously" and not in response to an inquiry, the onus of proving the truth remained with the defendant master. In the Chief Justice's view, if the statement was false, the issue then became whether it was made maliciously or made honestly. Rooke J. was of an entirely different view and saw the key issue as being whether the statement was made "honestly".

344 See Veeder, "The History and Theory of the Law of Defamation" (1904) 4 Col. L.R. 33.

The issue was finally resolved and the law set on a definite and irreversible path in 1825 in the decision of *Bromage v. Prosser*.[345] The plaintiff, a banker,[346] alleged that the defendant had reported to a third party that he had been informed that there had been a run on the plaintiff's bank. The defendant, under the general issue, had admitted that he had spoken these words but added that the words had only been phrased as a report, and that after investigating the situation and determining that his notes were still good he had told his audience that the story was false. The defendant appeared less than irresponsible. Parke J., at trial accepted the argument of the defendant's counsel and instructed the jury to find for the defendant if the words were spoken *bona fide* and without malice. The issue was simply phrased as a question of whether the defendant had spoken with or without good intentions which, as a question of fact, was to be determined by the jury. The jury not unexpectedly returned a verdict for the defendant which was overturned on appeal.

Bayley J. delivering the judgment of the court on behalf of Holroyd J. admitted that malice was often referred to as being the gist of the action and part of the case. However, he held, on the basis of the ancient authority of *Mercer v. Sparks*,[347] that it was not necessary to plead and hence prove malice unless the defendant had raised a *prima facie* excusable occasion. In the ordinary action of slander, malice was implied and meant only that the defendant had published the words without lawful excuse. Without a justifiable excuse which was categorized into set occasions, the defendant could not raise the issue. In effect, the judge isolated the question of the defendant's motives and understanding from the issue of whether he was justified in speaking the words, and relegated the matter to an issue that arose only after the defendant had satisfactorily established an objective and recognizable justified occasion. In effect, he stripped the defendant of the ability to submit evidence of good intentions and a lack of culpability under the general issue and established the fiction of 'express' and 'implied' malice. In Bayley J.'s view, a previous reference to malice, as being a substantive

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345 (1824), 1 Carr. & P. 475; 171 E.R. 1280; (1825) 4 B. & C. 247; 107 E.R. 1051, motion for a new trial granted (1825) 1 Carr. & P. 673; 107 E.R. 1362.

346 It is interesting to note that two of the most significant cases concerning the standard of liability in England in the Eighteenth Century involved banks as plaintiffs. See also *Capital & Counties Bank v. Henty* (1882), 7 App. Cas. 741.

347 (1586), Owen 51, 74 E.R. 892.

element of the action and a matter to be proved, must have been a reference to 'implied malice', which arose when words were not spoken on a justifiable occasion.

The decision in *Bromage v. Prosser* has proved to be the *fons et origo* for the application of a strict standard of liability throughout the cause of action. Each of the specific issues of the *prima facie* cause since this case have become subject to the rule that liability will issue without fault. This was not, however, the necessary result under the rigid 19th Century application of the doctrine of *stare decisis* of this case. The specific issue in *Bromage v. Prosser* concerned the matter of the defendant's general intentions in relation to his communication. Defamatory meaning is closely connected with this broad issue in that it is difficult to distinguish between an intention to 'defame' and an intention to cause defamatory harm, and by rendering the defendant's general intentions and reasons for communicating irrelevant to liability generally, they become irrelevant to the issue of whether the defendant published words that he intended to be interpreted as 'defamatory'.[348] However, the other elements of the cause of action, publication and reference to the plaintiff, give rise to distinct issues and concerns separate from the broad question of general motives.[349] Publication involves the question of control over the communication process and responsibility for the act of transmitting matter to a third party. Identification involves the issue of responsibility for general versus specific comments and whether the various degrees between these two parameters 'causes' defamatory harm. It does not follow as a matter of logic that the general rule that the defendant's general intentions are irrelevant to the cause should be extended to these particular issues within the case although this subsequently has been the view adopted by the judiciary.

Both of these issues, prior to the 19th Century, were considered questions of fact to be determined by the jury. Liability for publication was always based on intention[350] but since causation issues arose, with the transmission of permanent

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348 This was the inevitable result reached in *Capital & Counties Bank Ltd. v. Henty* (1882), *ibid.*

349 For instance, reference to or identification of the plaintiff is often a question of the form of language used and preliminary steps taken to ensure a correct or intended interpretation is placed on the words and not the broad question of whether the defendant had any general intention to harm the plaintiff.

350 See *Clutterbuck v. Chaffers* (1816), 1 Stark 471, 171 E.R. 533, where the question arose whether an unsealed envelope delivered by a messenger constituted publication to that messenger. It would appear that the issue was did the defendant intend publication by leaving the envelope unsealed. In

matter, intention was inferred from the circumstances of publication and the defendant's action and knowledge. As Lord Abinger C.B. directed the jury in *Bond v. Douglas*, "you will say whether a person who sends a paper addressed to the editor of a newspaper...sends it for the purposes of publication."[351] As a degree of legal responsibility for the consequences of an act was imported into the issue, principles of causation were introduced such as whether publication was the 'natural and probable result' of the defendant's original act. Since publication had to be established by the plaintiff to make out the cause of action, it was logical for the defendant to introduce matter to dispute the issue as to whether he, although the originator, was responsible for the actual incident of publication to a third party. With the development of the notion that the cause of action was one of strict liability, the rule emerged that the burden lay with the defendant to raise the issue which in effect turned the issue into a matter of a defence.[352]

Reference to or identification of the plaintiff had from the 17th Century been a matter to be determined by the jury.[353] Under rules of pleading, the plaintiff always had to satisfactorily set out the colloquium which established the connection between the defendant's words and the manner in which these words referred to the plaintiff, how they were 'of and concerning' the plaintiff. This was an essential element if the words did not contain an explicit reference to the plaintiff on their face. Numerous instances exist in the early action of defendants relying on the technical principle that the colloquium could not add to the meaning of the alleged words, but could only been used to interpret or extrapolate the meaning, to avoid liability when the plaintiff was not named specifically.[354] In practice, this often meant that a general or oblique reference was not actionable,[355] and although there do not appear to be any cases on the point in

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Delacroix v. Thevenot (1817), 2 Stark 63, 171 E.R. 153 similar facts were found to constitute publication when the defendant knew that the plaintiff's servant routinely opened his mail.

351 (1836), 7 Carr. & P. 626, 173 E.R. 275.

352 See Chapter I, page 4. Although some commentators are of the view that accidental or unforeseeable publication is an exception to the *prima facie* strict standard of liability, the fact that the defendant must raise the issue gives it the logical trappings of a defence.

353 *Ashby v. Billingsley* (1679), 124 E.R. 933.

354 For instance, *Johnson v. Aylmer* (1606), Cro. Jac. 126, 79 E.R. 109 where the words had only referred to "he".

355 *Henacre & Betts Case* (1663), 1 Keble 525, 83 E.R. 1091: "your daughters" was held not actionable.

the early action, it is most probable that an unintended reference to the plaintiff was also not actionable.

Support for this view in the 19th Century can be found in the decision in *Bourke v. Warren*,[356] decided in 1826. The defendant reporter had written a letter setting out the account of a crime in which he had not named the plaintiff but had inserted asterisks in the place of the alleged criminal. The plaintiff led evidence of individuals who interpreted the letter as referring to himself. The matter was referred to the jury by Abbot C.J. with the instructions that the question to be answered was whether the libel "designates the Plaintiff in such a way that those who knew him understood that he is the person meant." While this would appear to refer to the issue of whether the words were of and concerning the plaintiff, the judge went on to advise that they were to "consider whether the defendant shewed [sic] to those who knew the plaintiff that he was the person meant." Although somewhat ambiguous, this would seem to indicate that there had to be some positive or intentional act by the defendant for liability to issue, which view is strengthened by the actual verdict of acquittal.

Other cases in the 19th Century confirm this view.[357] In *Eastwood v. Holmes*, Willes J. non-suited the plaintiff when the words in question referred only to the owner of forged antiquities and it was not clear that the "defendant knew of the plaintiff's existence."[358] In a case decided in 1869, *Harrison v. Smith*,[359] Lush J. directed the jury to find for the defendant if they determined that he had only intended to refer to some fictitious person and not to a real character. Despite these authorities and the strong dissent of Fletcher Moulton L.J. in the Court of Appeal, the principle of liability without fault for any words found to be 'of and concerning' the plaintiff was adopted by the the House of Lords in *Hulton (E) & Co. v. Jones* [360] in 1910. Similar to *Harrison v. Smith*, this case also involved a piece of fiction. The defendant had written a spirited and satirical article about a character by the name of Artemus Jones who

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356 (1826), 2 Carr. & P. 307, 172 E.R. 138.

357 *Lefanu and Malcolmson v. Bull* (1843), 1 H.L.C. 637, 9 E.R. 910, where words spoken generally of factory owners were held to be actionable on the basis that the defendant intended to refer to the plaintiff.

358 (1858), 1 F & F 347, 175 E.R. 758.

359 (1869), 20 L.T.R.

360 *sub. nom. Jones v. E. Hulton & Co.*, [1910] A.C. 20.

carried on in a racey manner at Dieppe. Although evidence was led that the defendant had no intention to refer to or harm this plaintiff and had meant the article to be realistic generally but fictional specifically, there was contrary evidence that the plaintiff, a barrister from North Wales, had worked for the defendant's newspaper at one time and that the defendant ought to have known the name. The issue phrased was whether the defendant could be held liable regardless of a lack of intention to defame the plaintiff.

The majority of the Court of Appeal held the defendant liable, Farwell L.J. on the basis that that the defendant had been reckless in not ensuring that no one would be hit by the words and Alverstone C.J. on the basis that liability should issue regardless of intention or fault. Unfortunately for the law, the House of Lords, with little scrutiny, adopted the latter view.[361] In the view of Lord Loreburn, if the intention of the writer was immaterial in considering whether matter was defamatory, it need not be relevant in determining whether it is defamatory of the plaintiff.[362] By failing to distinguish between these specific issues, defamatory meaning and reference to the plaintiff, the breadth of strict liability was extended and the consequences of this standard compounded. If there was any uncertainty arising from the confusion inherent in the Lords judgment in *Hulton (E) & Co. v. Jones* , it was settled by the Court of Appeal decision in *Cassidy v. Daily Mirror*.[363] and again in *Newstead v.London Express*.[364] Both cases illustrate the consequences of imposing liability for publication without reference to any further restricting principle. Both involved a statement made by the defendant newspapers which was true insofar as they knew in relation to the figure to whom they were intending to refer, but the court found that the statement in fact referred to and was defamatory of another party.

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361 The lack of analysis is reflected by the fact that Lords Loreburn and Shaw agreed with Alverstone C.J.'s view in the Court of Appeal that intention and fault were irrelevant to the issue of publication, while Lords Atkinson and Gorrell concurred yet approved Farwell L.J.'s view that recklessness should be the benchmark. For the Court of Appeal judgment, see [1909] 2 K.B. 444 (C.A.).

362 *Ibid.*, at 24.

363 [1929] 2 K.B. 331.

364 [1940] 1 K.B. 377.

CHAPTER V

From this historical review, it has become apparent that the broad scope of the present action and the strict *prima facie* standard of liability are fairly recent developments. Although the basis was set in 1825 with the decision in *Bromage v. Prosser*,[365] the uniform application of liability without regard to fault within the plaintiff's case was the result of several English appellate court decisions through the early part of the 20th Century.[366] Ironically, as values and attitudes towards free speech, expression and opinion have liberalized in the last one hundred years, legal responsibility has been increased in defamation and the law has become more restrictive towards open communication. It is interesting to note that these leading English decisions have all involved a private individual as a plaintiff and a English newspaper as a defendant.[367] In contrast, those cases which have established exceptions to the strict nature of this standard of liability, especially in the area of responsibility for publication, have involved a private party as a defendant.[368] Within this context, it would appear that the development of uniform strict liability has been an effort in imposing a degree of press responsibility amongst the English media as much as it has

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365 (1825), 4 B. & C. 247, 107 E.R. 1051.

366 *Jones v. E. Hulton & Co.*, [1909] 2 K.B. 444, [1910] A.C. 20, [1908-10] All E.R. Rep. 29; *Cassidy v. Daily Mirror Newspapers*, [1929] 2 K.B. 331, [1929] All E.R. 117; *Newstead v. London Express Newspapers Ltd.*, [1940] 1 K.B. 377, [1939] 4 All E.R. 319.

367 *Bromage v. Prosser* (1825), *supra.*, note 365, involved a bank as a plaintiff as did the case of *Capital & Counties Bank Ltd. v. Henty* (1882), 7 App. Cas. 741 (H.L.). It might be suggested that, in these instances, a standard was created that protected these institutions from rumors of insolvency in order to avoid runs on what was and is a vital institution to our credit-based economy. Otherwise, cases where strict liability in reference to the plaintiff involved newspaper defendants include *Jones v. E. Hulton & Co, supra.*, note 366, *Cassidy v. Daily Mirror Newspapers, supra.*, note 266, *Newstead v. London Express Newspapers Ltd., supra.*, note 366.

368 *MacNichol v. Grandy* [1931], S.C.R. 696; *Huth v. Huth* [1915] 3 K.B. 32.

been a considered and well thought standard to be applied to all parties,[369] and most importantly individual defendants.

While these English decisions have been followed by several Canadian superior courts,[370] there has been little analysis of the policy underlying such a stringent standard, little scrutiny of the practical impact of such a measure of legal responsibility and no review of its applicability to the Canadian context.[371] The Canadian media environment is distinctively different than that in England. Firstly, there is not the competition in the daily national press in Canada[372] that tends to breed, in a quest for market share, the exaggeration, embellishment, shallow research and circumspect allegations characteristic of defamatory communications. The limited competition amongst different major publications in specific Canadian centres has, in many cases, evolved into a comfortable co-existence between two dailies with different formats and for the most part different markets.[373] In addition, the emerging tabloid press in Canada is hardly a type comparable to that spawned by the intense environment of Fleet Street with its characteristically sensational journalism. On this basis, it could be argued that the social context and background to defamation law in Canada is clearly different from that from which the standard developed in England, a valid reason for adopting a different approach to this complex area.

However defamatory doctrine should not be developed solely around or in response to the media industry. Although these enterprises may be the principal publishers of communications from which defamatory harm results and, given their financial resources to litigate and deep pockets to pursue, the primary defendants in defamatory actions, the law of defamation is equally applicable to individuals as it is to media enterprises.[374] The media as well as creating its own news often is a mere

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369 Corporations, either directly or vicariously, associations, societies, unions and other legal entities can be found liable for defamatory comments published under or with their authority. See Brown, *The Law of Defamation in Canada*, Vol.2, p.819.

370 See the authorities cited in Brown, *ibid.*, Vol. 1, pp. 24-35.

371 A review of the Canadian authorities cited in Brown, *ibid.*, indicates that the issue has rarely been argued before the Canadian courts and English precedents have been unquestioningly accepted.

372 In fact, there is only one national daily, *The Globe and Mail*. There are two competing national daily business newspapers, *The Globe & Mail Report on Business* and *The Financial Post*.

373 For instance, in Western Canada Vancouver, Calgary and Edmonton are all two paper cities.

374 The Supreme Court of Canada has also maintained that the media should not have any special status within defamatory doctrine and only enjoys "rights" in common with private individuals. See

conduit and broadcaster of comments or opinions expressed by others who may as easily be a defendant or co-defendant to a defamation action.[375] It has been previously argued that individuals should not find themselves subject to a rule of law that finds its rationale in a policy concerning a corporation.[376] While the importance of the media, as an institution providing a primary source of information on matters of public and private interest and as an industry from which substantial defamatory harm arises, should be taken into account as an important factor in determining whether the present standard of liability should be altered,[377] any consideration of a development in this area must also take into account the concerns of other parties.[378]

There are several routes by which present doctrine could be revised to minimize the deleterious effect of the present standard of liability and to better accommodate the interests underlying the action. The most obvious would be to alter the strict nature of the *prima facie* standard by incorporating either an intention, recklessness or negligence criteria into one or several of the specific issues that constitute the cause of action . Alternatively, the defences to the action could be substantially broadened, altered or modified. For instance, qualified privilege could be extended to a more significant range of communications deemed important, an honest belief in the truth of a statement could be a basis for avoiding liability or fair comment could be extended to all opinions. In addition, limits could be placed on the ability to recover either general, punitive or exemplary damages in certain instances or the scope of what is considered to be an actionable comment could be narrowed. Whichever option is deemed the most efficacious, the choice must be based on the overriding goal of facilitating and

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the decision of Cartwright J. in *The Globe & Mail v. Boland*, [1960] S.C.R. 203, 22 D.L.R. (2d) 277 and *Banks v. Globe & Mail Ltd.*, [1961] S.C.R. 474, 28 D.L.R. (2d) 343.

375 It is interesting to note that most standard form contracts granted by publishing houses contain an indemnity provision under which the author saves harmless the publisher from defamatory liability.

376 Despite many lower court decisions holding otherwise, the American Supreme Court reached this conclusion in *Dun & Bradstreet v. Green Moss Bldrs. Inc.* 105 S. Ct. 2939 (1985) where a majority of justices were in agreement that the constitutional privilege that attached to statements concerning public officials and figures was enjoyed by private citizens as well as the media.

377 The express provision in the *Charter of Rights and Freedoms* of "freedom of the press and other media of communication" (s. 2(b)) opens up the question of whether the media should be afforded special treatment and separate laws. If the Charter is seen to apply to private lawsuits, this provision would provide the basis for a challenge to any laws aimed specifically at the press.

378 For an example of no consideration being given to the important role of the media in providing a voice for opinions expressed by others, see *Cherneskey v. Armadale Publishers Ltd.* (1978), 90 D.L.R. (3d) 321, [1979] S.C.R. 1067.

maximizing the flow of socially valuable or potentially socially valuable communication while still retaining an adequate level of protection for privacy and reputation. Any reform of the law must also encourage the spread of communication in a manner that counterbalances the deterrence effect of the present strict standard of liability.

In this respect, it is helpful to briefly review the American experience and their attempt to create a set of coherent rules that incorporates a greater degree of free communication within defamatory doctrine.[379] While the specific development of doctrine in this jurisdiction has been shaped by a different constitutional instrument and a different application of that primary law, the principles and policy underlying reform of the American law are germane to the Canadian context. Up until the landmark decision of the U.S. Supreme Court in *N.Y. Times Co. v. Sullivan* in 1964,[380] American private law was substantially similar to that in Commonwealth jurisdictions. Although codified in some states, the substantive framework of strict liability in the *prima facie* case and a range of exculpating defences had not evolved and departed significantly from our common English-based heritage. In the *N.Y Times* case, the Supreme Court determined that a state statute which provided the basis for a substantial damage award to a governmental official was directly in conflict with the First and Fourteenth Amendments to the United States Constitution. The specific facts concerned an award of compensatory and punitive damages granted by an Alabama jury to a local police chief for defamatory injury arising from the general criticism of local police operations published in an open advertisement in the defendant newspaper.[381] The verdict was overturned on the basis that this form of state intervention, a statute providing a government official with a cause of action and remedy for critical comments aimed generally at the government, was analogous to an action for seditious libel, and was therefore unconstitutional.

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379 For an excellent analytical primer on the developments in this area, see *Handbook of Free Speech and Free Press*, Jerome A. Barron and C. Thomas Dienes, (1979).

380 *New York Times Co. v. Sullivan*, 273 Ala. 656, 144 So. 2d 25 (1962); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

381 Although the publication in question had not named the plaintiff specifically, the general criticism of the way in which local police had handled a civil rights demonstration on a Southern university campus was considered as referring to the plaintiff personally as chief of police. Therefore, liability arose because of the broad standard of liability imposed in determining the issue of 'reference to the plaintiff.'

The reversal of the trial and state appellate court decision by the Supreme Court was historical for several reasons. Not only did it constitute a significant extension of the scope of the First Amendment to what had previously been considered unprotected expression in the area of free speech[382], it established that the American Constitution and the principles enshrined in this instrument applied to the private law of defamation. Mr. Justice Brennan, delivering the majority judgment of the Court, determined that the broader policy reflected in the First and Fourteenth Amendments, that "debate on public issues should be uninhibited, robust, and wide-open",[383] necessarily contemplated and countenanced criticism of and attacks on governmental officials. In order to protect such communications, a distinct type of privilege which did not impose liability for all factual inaccuracies had to be extended into this realm. If not, individuals would be deterred from publishing potentially truthful information about governmental affairs for fear that they would either not be able to legally prove the accuracy of their statement or would, to their detriment, be put to the expense of proving the truthfulness in a court of law. Strict liability was in effect unconstitutional as it created an unjustifiable restriction on this 'privilege'. Incidental damage to the reputation of governmental officials was the unavoidable consequence of granting substantive effect to this principle. Although a vocal minority advocated, as a logical extension of the deterrence argument, that no limitation should be imposed on this new standard if the aim was open and robust public debate, the majority of the court determined that some restriction had to be placed on this new freedom. In order to provide sufficient 'breathing space' and room for error, a fault criteria for liability was rejected in favor of "actual malice", proof that a statement was made "with knowledge that it was false or with reckless disregard as to whether it was false or not."[384]

Two fundamental points arise in Brennan J.'s judgment. Firstly, it was assumed that to achieve a greater range of free speech and to encourage debate on

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382 See *Chaplinsky v. New Hampshire*, 315 U.S. 568 at 572 (1942) and *Roth v. United States*, 354 U.S. 476 (1957). These cases concerned criminal libel and obscenity issues, but the presumption was that if this type of communication was not protected then private defamation actions could not be considered protected. In essence, freedom of speech prior to the New York Times case was freedom to speak within the law.

383 376 U.S. 254 at 270.

384 This standard is clearly different from the traditional common law concept of "actual malice" which rebuts the defences of qualified privilege and fair comment: It expressly incorporates a recklessness criterion.

public issues a sacrifice had to be made of the protection afforded public officials. The possibility that false statements would be circulated was viewed as a necessary consequence of altering the standard of liability to give effect to the constitutional principles.[385] The inevitable conclusion reached was that the First and Fourteenth Amendments protected a certain amount of false communications. This was justifiable in the context of the pursuit of open debate and greater truth. While this policy---acceptance in certain instances of false communication---constituted an extension of the conventional common law concept of qualified privilege, it entailed a significant development as the defence was now based on the content of the defendant's communication rather than the "occasion" of the communication and the reciprocal nexus between the audience and the communicator. If the defendant's statement contained imputations that reflected on a governmental official and his conduct in public office then the new privilege would arise as a matter of right. No longer did the subject matter, circumstances, tenor of and audience to the communication have to coincide to form the privilege.

Secondly, the privilege was lost only when the defendant had shown a high degree of culpability with respect to the accuracy of his communication. Although phrased as "actual malice", this new criteria for liability was not based on the conventional common law concept. Rather than the defendant's motivations or his reasons for communicating being the primary factor,[386] it was his attitude towards the falsity of his communication that was considered as the key element in determining whether the privilege would be lost. Liability would still issue if the defendant had spread a "calculated falsehood"[387] or had blatantly disregarded and shown no concern for the accuracy of his communication. Any pre-existing or subsequent animosity between the plaintiff and the defendant was not directly relevant to this issue. This development, although subtle, focused the issue of culpability on the defendant's understanding at the time of communicating, his approach to and belief in the accuracy

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385 See Brennan J., *Ibid.*, at 271: error "is inevitable in free debate". This conclusion is based on the "marketplace of ideas" theory that it is necessary, in order to better ascertain truth, to promote, review and assess both false and true statements.

386 The problem with reaching an adequate definition of "malice" under Canadian doctrine is that malice is a conclusion which can be reached from a variety of different presumptions. See Chapter II at page 46-47.

387 This term, "calculated falsehood", was subsequently used in *Garrison v. Louisiana.*, 379 U.S. 64 (1964).

of his communication, and the steps taken to determine whether his statement was true.[388] The prior relationship or subsequent conduct of the defendant was only relevant insofar as it reflected on the defendant's understanding at the time of communicating. Culpability under this new standard was dependent upon the defendant's attitude towards truth which was considered as a constitutional value.

The actual decision in the *N.Y. Times* case, as with most watershed decisions, gave rise to more questions than it answered. The next decade saw a multitude of cases brought before the Supreme Court testing the parameters of the principles enunciated.[389] The scope of what constituted a "public official"[390] and the refinement of the specific standard of liability that would rebut the privilege[391] were both subject to considerable review. In 1967 in the decision of *Curtis Publishing Co. v. Butts*,[392] the area of protected speech was enlarged when the privilege was extended from public officials to public figures in general.[393] In this instance, the allegations concerned an athletic director at a University, an appointment to a public institution that was funded by a private alumni association. The Court determined that the privilege applied because the plaintiff was a public figure and had become embroiled "in an important public controversy."[394] Although this extension, from elected governmental officials to non-elected, non-governmental public figures, may not on its face appear significant, it involved a substantial shift in the rationale and policy underlying the privilege. Whereas it had previously been rooted in the democratic right of the 'citizen-critic' to comment freely on governmental affairs and the control of governmental action which was not to be inhibited by consequential defamatory liability, it now constituted an

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388 This aspect, making the privilege defeasible on the basis of purposeful falsehood, constituted a rejection of the "absolute" right view advocated by Justices Black, Goldberg and Douglas in separate majority opinions.

389 Also to test the changing political complexion of the Supreme Court and to seek out a more conservative view from this institution.

390 *Rosenblatt v. Baer*, 383 U.S. 75 (1966) where the privilege was extended to a former public official and defined as those individuals who "appear to have substantial responsibility for and control over the conduct of governmental affairs."

391 *Henry v. Collins*, 380 U.S. 356 (1965) where intent to inflict harm through the intentional publication of falsehood was considered to be a requirement of actual malice.

392 388 U.S. 130 (1967).

393 The division of opinion of the Court gave rise to some uncertainty. At least, a plurality was of the view that some form of privilege extended to comments touching public figures although the actual standard for liability in such instances was considered to be gross negligence and not actual malice.

394 *Ibid.*, at 155. The degree to which the plaintiff must have been voluntarily involved was not answered with adequate precision.

entitlement to comment freely on public figures in connection with matters of public concern.[395] The underlying rationale was based on the presumption that a public figure, with greater access to media, had a better opportunity to defend himself through rebuttal and counter-attack. Broad debate on any matters of public interest was to be encouraged and with a means of rebuttal, a public figure could respond and reply to allegations, hopefully resulting in a discourse that would provide a means of determining a better quality of 'truth' on such issues.

The inevitable conclusion to the development of this rationale, open debate on all matters of public concern, was completed by the Supreme Court in 1972 in their decision in *Rosenbloom v. Metromedia*[396] where the parameter of the privilege was defined as "all discussion and communication involving matters of public or general concern."[397] The plaintiff, a merchant described by the defendant radio station as a 'smut-peddler' in commenting on a local police crackdown, was forced to meet the onerous standard of proving "actual malice" in order to gain compensation. Although he was a private individual, the defendant's statement had been made in the context of an issue of public concern which brought it within the ambit of the privilege. Mr. Justice Brennan, for a plurality of the Court, was of the view that the defence applied notwithstanding that the defamatory statement 'hit' what had previously been an anonymous individual and regardless of whether the individual had become involuntarily involved in the public issue.[398] The reasoning was straightforward:

> "if a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to be come involved. The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety."

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395 The *N.Y. Times* reasoning had also been based on the notion of reciprocity: the citizen critic should be entitled to comment openly on the government in the same manner that senior members of the executive enjoyed absolute privilege for comments made by them while in office. With the shift in the scope of the privilege in *Curtis Publishing v. Butts*, this was now irrelevant logic.

396 403 U.S. 29 (1971).

397 *Ibid.*, at 43.

398 Per Brennan J. (Burger C.J. and Blackmun J. concurring), *Ibid.*, at p.44. In his view, a public issue did not become any less "public" because of these incidental aspects.

The basis of the privilege no longer arose from the status of the plaintiff, whether or not he or she was a governmental official or public figure, and now had expressly become centred upon the general subject matter of the communication.

The implications of such a broad standard did not go unnoticed in dissenting opinions. The parameter of this privilege in essence constituted a grant of right to be reckless in commenting on any matter of public concern. It created the potential for the invasion of the privacy of many individuals drawn into a public issue. The problem inherent in determining what constituted a matter of public interest was supplanted by the courts assuming the responsibility of determining this issue and in effect becoming the arbiter of public interest. This matter was further complicated by the possibility that the media could create, through focus and attention, a subject of public interest thereby drawing private individuals into both the public eye and subjecting them to the unfortunate circumstance of being defamed without opportunity for compensation. As a result of these consequences, a re-entrenchment of this constitutionally-based doctrine and a retreat on the broad scope of this privilege occurred in 1974 in the case of *Gertz v. Robert Welch, Inc.*[399] This action concerned a libel suit brought by a Chicago civil liberties attorney, Elmer Gertz, against a arch-conservative magazine that had printed allegations that he was a Communist and the author of a conspiracy to frame a police detective. The Supreme Court rejected the argument that the constitutional privilege could be raised against this plaintiff, who, it was determined, was not a public figure but had been drawn into a public controversy or issue.

In doing so, the majority of the Court advocated the rejection of the 'public issue' basis of the privilege and a return to the 'status criteria' established earlier in the *New York Times* and *Butts* cases, based on whether the plaintiff and subject of the comment was a public official or a public figure. The court suggested that a private individual did not voluntarily assume the risk of exposure to strong criticism as, it was presumed, governmental and public figures did and also did not have the access to media to counterattack and rebut criticism.[400] Therefore, they should not be drawn into the circumstances created by this privilege and should be afforded a higher degree of protection. While the majority was clear in their rejection of the public issue ambit set

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399 418 U.S. 323 (1974).
400 *Ibid.*, Powell J. at 344 and 345.

out in the controversial case of *Rosenbloom*, they were less clear in setting other criteria concerning the defence. Instead of establishing a definitive standard of liability that would go to defeat the privilege when it did apply, the Supreme Court left this matter open for each state to determine in shaping its own defamatory law. Several caveats were however expressed which represented minimum constitutional safeguards. In no instance could liability without fault be imposed for a defamatory falsehood injurious to a private individual[401] at least where the substance of the statement makes "substantial danger to reputation apparent."[402] Presumed or punitive damages were not to be granted unless liability was based on a determination that the defendant had knowingly circulated a false statement or had been clearly reckless in determining whether it was false or not. If the privilege arising from the First and Fourteenth Amendments did not extend to all public discussion, at least a limit could be placed on damages awarded against an individual who had not departed greatly from a reasonable standard of conduct.

In addition, since the general policy issue phrased within the specific facts of the *Gertz* decision was seen as one not of general censorship, but specifically of press censorship, the assumption has arisen that the reference by the court to "publishers and broadcasters" meant specifically the media. Subsequent lower courts have since interpreted this to mean that these enterprises enjoy a special constitutional status.[403] Although this development has since been diminished by the majority opinion of the Supreme Court in *Dun & Bradstreet Inc. v. Greenmoss Builders Inc.*,[404] where it was suggested that the constitutional privilege applied to any defendant, private or media, the distinction is still very real and truly polarizes the interests and policy underlying the American doctrine. One other interesting development arose from the *Gertz* decision. In commencing his reasoning, Mr. Justice Powell emphatically stated, albeit *obiter dictum*, that "[u]nder the First Amendment, there is no such thing as a false idea".[405] This comment has subsequently been interpreted as meaning that an expression of a

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401 *Ibid.* at 347.
402 *Ibid.* at 348.
403 The interests and tension underlying the action were considered to be a balance between the individual's and state's concern for the protection of reputation and the need to have "a vigorous and uninhibited press."*Ibid.* at 342.
404 105 S.Ct. 2939 (1985)
405 *Ibid.*, at 339.

clear opinion, no matter how unreasonable or extreme, does not have the same impact as a false statement of fact and must fall within constitutional protection. Whether or not this rule supercedes or integrates the traditional common law of fair comment or merely slightly modifies it,[406] the application of this principle clearly recognizes a distinction, however grey or difficult to define within the governing parameter of a rule, between the impact an opinion may have on reputation and the assertion of a false fact, and in effect it creates an entitlement to express an unpopular opinion.

The *Gertz* decision, while attempting to set up a hierarchy of factors that can be utilized in a flexible and equitable manner to approach each case on its merits, created the potential for fifty different bodies of law. Understandably, a considerable amount of confusion and uncertainty was created while each state developed its own specific rules within the framework set out by the Supreme Court. More importantly though, this decision as the conclusion of a development that was started with the *New York Times* case reflects the culmination of a problem inherent in the American defamatory doctrine. While perhaps solving an earlier flaw in redressing the balance between open communication and protection of reputation, in its place a new set of rules were substituted creating a new dilemma in balancing the power and responsibility of the media as an institution against a citizen's right to privacy and the need for the protection of reputation from the circulation of false statements. Each new factor developed in an attempt to reconcile the tension between these interests gives rise to a new problem in finding a satisfactory basis and ambit for the emerging body of doctrine.

While a governmental official is relatively easy to define because of the clear factual aspects and hard indicia of this status,[407] what constitutes conduct related or

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406 The exact effect of this principle upon existing doctrine has varied from state to state. In some jurisdictions, it has been interpreted as meaning that all opinions, whether comments on private or public figures or officials, are protected. In other jurisdictions, it has been interpreted as broadening the common law of fair comment so that a true factual basis for a comment upon a matter of public concern or a public figure no longer has to be established; and in others, that the principle only applies to the media. For a brief summary, see Brown, *The Law of Defamation in Canada*, Vol.2, pp.1191-1192.

407 See Brennan J.'s view in *Rosenblatt v. Baer, supra.*, note 396 at 85: "those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or over the conduct of governmental affairs."

connected to his public office[408] and what constitutes a public figure[409] are less easy to define. Is the criteria to be public recognition, ostensible power and influence or the acts of the plaintiff in seeking or welcoming publicity,[410] and when or how does a figure lose his or her "public" status? What is sufficient proof of the criteria which will defeat this *prima facie* privilege is complicated by the range of standards and the question which standard, from mere negligence to actual malice, is applicable.[411] The definition of "media", to whom the privilege was at first seen to apply, also is problematic.[412] Why and when does this special status arise for the "press" over the common citizenry? Is it to be based on the frequency of publication, the mode of distribution, the size of the audience or the nature of the audience?[413] It is also difficult to draw a clear distinction between compensatory damages, that only issue in the absence of proof that the defendant knowingly or recklessly circulating falsehoods on matters of public concern, and punitive damages, an issue clouded by the discretion that always accompanies any award of damages. In addition, the calculus involved in determining whether the privilege will issue and what additional rules will apply when it issues creates an impractical complexity. Is the plaintiff a private individual, a public figure, or a governmental official; was the comment connected to the plaintiff's public or governmental status, or was the comment only on a matter of public concern; was there real and apparent danger of substantial defamatory harm or was the consequential interpretation unexpected; was the comment a calculated falsehood or common negligence? These questions, all relevant to the standard of liability or the damages that can be claimed, clearly give rise to a complexity which in turn leads to unpredictability.

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408 What can be considered as a matter relative to the fitness of an individual for public office has a broad scope and does mean that the subject matter of the comment is also relevant to the issue in addition to the status of the plaintiff.

409 Is notoriety of achievement or the seeking of public attention to be the dominant factor criteria?

410 This problem is illustrated by posing the simple question concerning such enigmatic figures as the authors J.D. Salinger or Thomas Pynchon. Both have published novels internationally to acclaim and accepted the benefits of submitting a work into the public domain; both undoubtedly, if they chose, would have easy and open access to the public media to voice their views; yet both have made concerted efforts to avoid all public attention and focus. Are they "public figures"?

411 In the case of national publications, it is clear that a plaintiff can forum shop to find the jurisdiction that presents the least onerous burdens and the greater opportunity for success.

412 The decision of the majority in *Gertz v. Robert Welch Inc., supra.*, note 399 was expressed as applying to "publishers and broadcasters" which has subsequently been interpreted as meaning the "media". Some doubt on the restriction of the privilege to the media was cast by a majority opinions in the Supreme Court decision in *Dun & Bradstreet Inc. v. Greenmoss Builders Inc.*, 105 S.Ct. 2939 (1985) where it was suggested that the privilege applied to any defendant, private or media.

413 These questions may of course be academic after the decision in *Dun & Bradstreet v. Moss, ibid.*

Given the amount of debate and general uncertainty and confusion in the law, it can be argued that the American experience has been less than a success in terms of the development of a coherent and stable body of law to provide both guidance and certainty in application. While the policy underlying the reform of the common law---open debate on public matters and the encouragement of the free circulation of information that potentially has a social value and benefit---can be applauded, the specific rules and principles that have been formulated to achieve this goal can be criticized. This experience though is, from the Canadian perspective, both enlightening and educational since it would appear that the development of the Canadian law may be poised at a threshold with the application of the *Charter of Rights and Freedoms* to defamatory doctrine very much of a reality.[414] Previous commentators have advocated the development in Canada of a '*N.Y. Times* privilege', an extension of the existing common law concept of qualified privilege to communications made on matters of public concern.[415]

The Charter does state that "everyone" has freedom of "thought, belief, opinion and expression" which, when applied specifically to defamatory law, may mean the right to communicate within a less restrictive regime of liability. Since the defence of qualified privilege forms the primary instance under the present law[416] where latitude is granted for error in the truthfulness of a communication and strict liability will not be imposed when an erroneous statement of fact has been made, it might appear to be the best means through which these rights can be fully manifested. If a party when communicating on a matter of public interest knows that reliance can be placed on this defence, the willingness and ability to communicate on such matters would be increased. Such a positive principle should result in the greater circulation of information and more open and robust discussion of important issues. However, before this constitutional instrument is applied *carte blanche* to defamation, there

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414 See *Coates v. The Citizen et. al.* (1988), 44 C.C.L.T. 286.

415 See Doody, "Freedom of the Press, The Canadian Charter of Rights and Freedoms, and A New Category of Qualified Privilege", (1983) 61 Can. Bar Rev. 124 and Madott, "Libel Law, Fiction, and the Charter", (1983) 21 Osg. Hall L. J. 741. The argument advanced by the defendant newspaper in *Coates v. The Citizen et. al.*, *ibid.*, was even paraphrased as a "New York Times privilege".

416 A false statement of fact will also not result in liability if the defendant can establish accidental publication, absolute privilege or innocent dissemination. These defences are limited to specific settings and do not have a broad application like qualified privilege.

should be a clear basis founded on considerations arising from the common law to warrant its application,[417] and a confident belief that it will have beneficial consequences.

For the Canadian courts to accede to the extension of this defence and in essence create a 'constitutional privilege', it will also take a diametric reversal in policy to that which has been expressed in the past by the Supreme Court of Canada. Notwithstanding previous Canadian lower court decisions that supported the application of qualified privilege to comments made on matters of public interest,[418] the Supreme Court has twice unanimously rejected this view. In *The Globe and Mail v. Boland*[419] and again in *Banks v. Globe and Mail. Ltd.*[420], the defendant newspaper was unsuccessful in arguing that their comments should be considered privileged. The *Boland* case involved statements made concerning the campaign of a candidate for public office and the *Banks* case, comments on the conduct of a director of a national union which was in the midst of a labor relations dispute. In both cases, Cartwright J. on behalf of the court was clear and emphatic in distinguishing the 'right' to comment on matters of public interest that existed under the defence of fair comment from the 'duty' that must exist to found the defence of qualified privilege. He confirmed the conventional common law rule that the speaker must bear some special relation to the subject matter for the defence to succeed[421] and disagreed with the notion that the privilege existed, as a matter of right, when the communication concerned a matter of public interest and the commentator was a newspaper.[422] The defendant, as a member

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417 Unfortunately, the application of the Charter to the private law of defamation will probably be determined by constitutional principles rather than true considerations of a need for the infusion of the principles embodied in this instrument.

418 See *Showler v. MacInnes* (1937), 1 W.W.R. 358: the vital concern of the citizenry in the activity of a labor organization. Also see the trial decisions of *Drew v. Toronto Star Ltd. & Atkinson*; cited in Banks v. Globe & Mail Ltd., [1960] S.C.R. 203. 22 D.L.R. (2d) 277. and *Dennison v. Sanderson.*, [1944] O.W.N. 264.

419 *Ibid.*

420 [1961] S.C.R. 474; (1960) 28 D.L.R. (2d) 345.

421 The court rejected the notion that a newspaper has a duty to disseminate information on matters of public concern. In emphasizing the conventional notion that the publisher under qualified privilege must bear some 'special relationship' to the audience, the Court may have adopted a position that effectively denies a newspaper, who obviously has a public audience, the ability to rely on the defence in any instance when a matter of public interest is at issue.

422 In doing so, Cartwright J. disapproved of *Showler v. MacInnes*, *supra*, note 418 and Dennison *v. Sanderson*, *supra*, note 418 and distinguished existing English authority which supported this proposition to the specific facts.

of the press, enjoyed no greater status than any other citizen, which did not include the freedom to make a false statement of fact on a matter of public interest.

It would appear from these decisions that the prevailing view of the Supreme Court, although pronounced almost thirty years ago, is that no special latitude is to be granted to these types of communications. Notwithstanding the potential for common benefit and regardless of the underlying principle of the "common convenience and welfare of society",[423] it is only in the exceptional instance that a matter of public concern will be considered one of these "occasions".[424] This result is surprising given that the law in certain instances will permit false statements of fact to go unremedied when the concern is a private matter but rarely when it is one of public concern.[425] Cartwright J. did offer an explanation for this policy. This "common convenience" demanded that defamatory law protect public figures. The adoption of a rule permitting unrestricted communication as of right on all matters of public concern without due respect for truthful content would deter "sensitive and honourable men from seeking public positions of trust and responsibility."[426] In his view, the conduct of public affairs would be detrimentally affected because individuals would be more reluctant to enter into an area of activity where they would be exposing themselves not only to criticism but to false and unremediable defamatory comments.

Against this view, it is interesting to contrast the American perspective. An assumption underlying the development of their constitutional privilege is that exposure to public criticism is an unavoidable incident of entering or aspiring to public office or public life.[427] This is the inevitable consequence of recognizing the fundamental entitlement of each citizen to engage in and contribute to the democratic process of self

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423 This justification contains little substantive argument though as an opposite result can also be defended as being in the interests of the "common convenience and welfare of society.

424 *Adam v. Ward*, [1917] A.C. 309 involved publication for the purposes of vindicating a previous false accusation and correcting current public information; *Allbutt v. Gen'l Council of Medical Education & Registration* (1889), 23 Q.B.D. 400 concerned the publication of regulatory information for the public benefit.

425 The reluctance of the court to extend this defence to comments made on matters of 'public interest' may be partly attributable to the fact that such comments inevitably have a wide audience. Present rules requiring a reciprocal interest between the audience and the publisher makes the defence most applicable to a limited audience setting.

426 *Ibid.*, at 281.

427 Note 395, *supra*.

government and to be entitled to comment openly on public interest issues.[428] To give real substance to this principle, a certain amount of latitude must be given for error, and false statements of fact tolerated when the motives of the speaker are good. The "governors", those in positions of influence and power be they public officials or public figures, must voluntarily submit themselves to and accept open criticism, which may involve exposure to erroneous, although not malicious, statements of fact.[429] Whereas the reasoning in the *Banks* and the *Boland* cases suggest that Canadian defamatory law must be maintained so as to protect public figures from false statements of fact[430], the American law considers it necessary to accept limited defamation of public figures in order to accommodate 'freedom of speech'.

While the basis and underlying reasons for the two different approaches may be ascribed to differing conceptions of our respective social fabrics and the role and responsibility of our governments and public figures, the issue is more complex than the simple question whether communication on matters of public concern should be encouraged. There is probably no disagreement on this laudable aim. Access to and the circulation of information on governmental, cultural, educational, economic and other common activities is a social imperative. For this goal to be properly respected, it must include the communication of ideas and opinions about these activities and necessarily encompass comments on people and figures concerned with these activities. The real issue though is whether the best means to achieve this end is through the development of a 'privilege' or whether there is a more effective and less disruptive means by which to encourage communication.

One significant problem with a 'public interest' standard is that it would result in not only public figures but private figures suffering the increased risk of exposure to unremediable defamatory harm. As the majority of the U.S. Supreme Court recognized

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428 In addition, it arises from the view that the media has a right and responsibility to disseminate information to the public on such issues.

429 The concept of "governors" can of course be extended from the literal government officials to the metaphorical public figure who can "govern" through the exercise of power and influence, and access to the media.

430 It should be noted that the view of the majority in the N.Y.Times case, which stopped short of adopting an absolute privilege which was advocated by White, Douglas and Blackmun J.'s, did posit actual malice as the threshold to be retained, it is assumed, to provide at least a minimum of protection for government officials.

in *Gertz v. Robert Welch, Inc.*,[431] public issues can involve private individuals, either directly or indirectly. To utilize this parameter as the ambit of a special privilege would not only strip many private individuals of the full protection that the law affords for defamatory harm but also limit the minimal protection that it affords for privacy. Private individuals caught up in a public issue do not have the same opportunity to respond to public discussion as do public figures.[432] Although the public benefit to be derived from open discussion on matters of public concern may outweigh these private interests, if the liberalization of the speech will affect all individuals, whether 'public' or private, then it may be more rational to look at altering the standard of liability in a uniform manner. This at least would counter the argument that to reduce the level of responsibility for speech on matters of public concern would deter 'honest' individuals from entering public life as no distinction between public and private life could be made.

The scope of a new standard of liability based on the content of a communication also would be difficult to define. The definition of 'public interest' that presently exists within the common law under the defence of fair comment is vague and unsatisfactory.[433] Rather than being a concept that contains clear indicium, public interest can vary as what is considered important to the public varies and the perspective of the viewer changes. Without a clear definition, the courts would be forced into imposing their own concept and become, in effect, the arbiters of public taste. A broad interpretation would extend the possibility that private individuals may suffer under such a standard while a narrow interpretation would undermine the policy behind the privilege. A general test would not encourage communication, the *raison d'etre* for such a defence. The American compromise, basing the privilege on statements made concerning either governmental or public figures, is an imperfect solution. The criterion, when shifted from the content of the communication to the context and the status of the plaintiff, becomes centred on the fortuitous event of who is hit by the communication. Public figures may be most often involved in matters of public concern and may be better placed to assume the risk of and respond to such allegations.

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431 418 U.S. 323 (1974).

432 In addition, it is only an assumption that public figures do have the means to rebut and offer an alternative view on disputed allegations.

433 See Chapter II at pages 44-45.

However, this latter assumption is not always true and more importantly the imposition of this criterion adds support and credibility to the argument that the development would affect the quality of public life in Canada[434] and the quality of entrant into these specific positions.

Perhaps the primary drawback arising from the creation of a 'public interest' privilege would be the effect that it would have on the accuracy of information in the public domain and the nature of general discussion concerning public affairs. The value that is attached to 'true' information under the present law is self-evident.[435] The publication of true fact, or opinions based on true fact, is accepted although potentially defamatory and damaging because of the actual benefit that may arise and the potential for benefit to arise from the circulation of such information.[436] False statements of fact are damaging not only to the subject of the statement but also to those parties who rely on such statements. The acceptance of false statement of facts, even if limited by a recklessness or a negligence standard, would result in a greater amount of inaccurate information being circulated on matters of public interest. Unless a high standard of responsibility is maintained, the quality and the reliability of information provided to the public would decline as would the benefit that would be gained from 'open discussion'.[437] 'Robust debate', when false statements of fact are accepted, may be ineffective and deleterious debate.

The assumption made in American doctrine, that to encourage and promote the circulation of true information a certain amount of false communications must be

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434 Another explanation for limiting the extension of qualified privilege might be based on an aspect of parliamentary rule that is not found in the republican political structure, the necessity of having public confidence in the government. A law that allows for the circulation of false facts without threat of legal remedy except in exceptional circumstances might severely limit the ability of the government to govern. While this argument at first may appear to be an affront to democratic principles, when it is used to oppose special treatment for government officials over and above that of the common citizenry, it is more palatable.

435 It is reflected in the existence of the defence of justification and the basis of the defence of fair comment. Although true statements of fact or comment may be defamatory and damaging, they are still permitted because of the inherent value to be recognized in true statements and the potential for social benefit.

436 "Truth" is clearly a common value promoted and pursued throughout our legal system and social order. Although it can be argued that 'truth' is necessarily a subjective determination, it must be accepted in the realm of fact, that there are such things as false facts, commonly called lies.

437 Because 'public interest' comments are intended to reach a wide audiences, the detrimental effect would of course be compounded.

accepted, is based on the 'marketplace of ideas' doctrine. Under this theory, the primary benefit to be derived from the acceptance of 'false' communications lies in the 'greater truth' that will result through the scrutiny of all ideas. In the abstract and in the realm of opinions and ideas, this view holds considerable merit. Opinions or general comments tend to be reasonable or unreasonable rather than true or false. The open expression and discussion of ideas on matters of both public or limited interest is progressive. It should result in the better formulation of subsequent ideas and opinions, and a more informed decision making on all matters. However, when applied on a practical level to the world of facts and events, the marketplace theory can be questioned. False statements of fact can be extremely harmful both to the subject of a statement and to those who accept and rely on such statements. The allowance of a greater number of false statements of fact through the creation of a broader base for the defence of 'qualified privilege' may be too high a social cost to incur in order to promote open communication.[438]

The present benefit of the strict standard of liability clearly lies in the higher degree of responsibility which ought to be exercised by those publishing comments that appear to be 'defamatory'.[439] A publisher must focus on the potential interpretation that could be placed on the meaning of his communication, the accuracy of his facts, the form of his expression and whether any opinion might be construed as an allegation of fact that cannot be verified. On top of this specific review, he must also research beyond his communication to ensure that no oblique construction can be made which points his communication towards an unknown party or from a generalized statement to a specific individual. This process should result in the minimization of the incidences of defamatory harm arising but it also deters, in a stifling and muting manner, open communication. A prudent individual will err on the side of caution rather than expose himself to the risk of liability. This effect extends to all types of communication because of the broad ambit of actionability.

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[438] The end result of the marketplace theory is only arrived at if thorough discourse, rebuttal and open debate is achieved. To reach this end, there must be open and free access to channels of public communication. Whether this is a reality in the Canadian media environment can be doubted when it is dominated nationally by several large corporations.

[439] It has previously been argued that strict liability is justifiable when a communicator is positioned to know that he is assuming the risk, that is when he is commenting on a matter that appears potentially defamatory.

The present defences do not substantially alter this result because they will only issue when the context or the 'occasion'[440] or the content of the communication is acceptable.[441] If the relaxation of liability without fault would result in the acceptance of and an increase in the number of false communications made, it may be more appropriate to limit the basis of the cause of action and the ambit of what is considered to be a defamatory statement rather than the standard of liability. In this manner, the benefit of responsible, accurate and reliable communication of information would be retained while the impact and negative effect of strict liability minimized. We have seen how in the very early stages in the origin of the tort, actionability was predicated on specific allegations of serious conduct or afflictions. As the cause shifted from a quasi-criminal to a civil remedy through the 18th Century, a substantial broadening of the action occurred when compensation and protection of reputation came to be seen as the over-riding principle. With the development of a defamatory criteria that was the co-equivalent of harm, the archaic means of restricting liability through distinguishing between types of communication was for the most part discarded.[442] This notion, that some statements cause greater harm than others, still is a tenable proposition.

Not all comments carry the same impact and cause the same degree of damage. This is already recognized to a certain extent under the present defence of fair comment where statements of opinion are accepted when in the proper form and on the appropriate subject matter.[443] While an unfavorable opinion may cause emotional or psychic harm, it does not cause significant damage to reputation, the primary interest protected by the law, in the same manner as a false allegation of fact. A statement, if clearly phrased as an opinion, is a subjective expression of a viewpoint, an evaluation, reflecting as much on the individual expressing the comment as the subject of the statement. If clear expressions of opinion on all matters were considered to fall outside the scope of what was considered defamatory, more breath would be granted to free speech. Parties could express themselves more freely on all matters without the threat

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440 Absolute and qualified privilege.

441 Justification and fair comment.

442 Vestiges still remain in those jurisdictions that retain slander *per se* and slander actionable only on proof of special damages.

443 That is when the comment is clearly separated from the fact, is based on verifiable facts, and is on a matter of public interest. See Chapter II at page 44-46.

of a defamatory lawsuit as long as they ensured themselves that any facts expressed or implied in their communication were true. Abstract information could be more freely circulated. Discussion in the realm of ideas, policies, principles and general affairs would be encouraged while a secure amount of protection still afforded for the reputation of individuals and their right to be free of unsubstantiated false allegations of fact.

This shift in focus would not greatly affect the present doctrinal structure. The definition of what constitutes a defamatory allegation could be altered to a "false statement of fact which negatively affects the reputation of the plaintiff". It previously has been argued that the manner in which the present defamatory criterion is applied removes this determination from the realm of actual fact to a conclusion drawn by the judge or jury based on the words themselves. Whether a statement is considered defamatory is a question of the meaning to be attributed to a communication and not the effect of those words. As a result, there would be no shift in focus when using this new standard. The determination and the normative effect of this approach would remain the same: it is the manner and form in which communications are framed that is as important as the actual effect of the communication.

A crucial issue in the application of this standard is the development of a satisfactory method for distinguishing between a statement of fact and a statement of opinion. It has been previously noted that these two elements exist on a spectrum with little hard indication of where an opinion stops and an assertion of fact starts. However, on a practical basis it is possible to identify what is an allegation or imputation of fact and what is an expression of opinion. An unqualified statement of a past event is clearly an assertion of fact and if false should still be actionable.[444] A statement that gives rise to an implied allegation of fact also has the same effect on the audience and should still be considered actionable.[445] However, communications without a direct focus on an underlying factual assertion, that are general and evaluative in nature, do not carry the same impact. For instance, an allegation of a general

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444 For instance, an allegation that is incorrect as to a past event: "X received a kickback" when no illegal benefits or privilege was received.

445 For instance, "X is corrupt": no specific allegation is made but the opinion is so specific as to impute a prior fact which if not proven, should be actionable.

character defect ('X is incompetent') if made without reference, expressed or implied, to a specific course of events constitutes a general opinion rather than a factual imputation. When the evaluation is so specific as to implicitly approve an underlying factual reference which is false ('X the supervisor is incompetent'---funds were embezzled from his department), then the communication still should be actionable. Qualifying words of belief or supposition, that clearly withdraw any positive assertion of fact, could be used in order to discuss in the abstract unverifiable facts.[446] In this manner, comments and discussion which often are most beneficial to informed decision making and analysis of issues could be encouraged without being subject to the present 'defamatory spectre'.

While this framework might be criticized for substituting a complex structure in place of what is presently a relatively simple determination, the complexity is not out of place given the subject matter under the law of defamation. It would apply at the perimeter of the action, where actionability is an issue, and not affect other components of the action. It is admitted that it would introduce some doubt and uncertainty into the law in attempting to determine what is communication is an expression of opinion and what is a statement of fact. However, this would not add to the present uncertainty that exist in determining whether or not a communication is defamatory. The development would also limit the application and effect of the present law of defamation to seriously damaging statements without adopting an irrational limiting structure such as the imposition of restrictions on what damages can be recovered or must be proven when the other party holds some special status.[447] In addition to encouraging the communication of abstracted information on people, institutions and events, it should also improve the quality of the manner by which such information is expressed. And with more open communication and circulation of opinions, it should enhance the true value and recognition that can be placed on the reputation of others that stand up to what may be considered unpopular opinions.

This development, while limiting the restrictive impact of liability without fault to factual allegations and improving the quality and force of expression, still would not

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446 For instance, "I believe that X's conduct is unethical." clearly places the speaker between the figure and the audience.

447 As has been developed in the United States: see *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974.

solve the potentially broad scope of the action that arises because liability will issue for any communication that is found to refer to the plaintiff. It has been noted that liability without fault should result in preliminary steps being taken to ensure clarity of meaning and factual accuracy. However, the present rule concerning reference to the plaintiff makes it necessary to go beyond the content of the communication and ensure that no oblique meaning and reference will arise that may result in liability. In the case of the media with a broad and anonymous audience, this may be justifiable as their form of communication is inherently dangerous. Inaccurate identification or unspecific references can be extremely embarrassing and damaging to third parties. However, the rule of strict liability also renders defamatory comments made generally of a body, organization or group. While the law should not countenance false statements of fact made of such entities merely because an individual is not named specifically, the present rule inhibits general discussion of these parties. Liability without fault in this instance can lead to speculative actions where the need and desirability of an award of damages can be questioned.

A standard based on negligence for this specific issue would ensure that 'accidental' reference, where retraction and apology is the more appropriate remedy, would not be actionable while also retaining a reasonable level of responsibility. This development would not affect the necessity of clearly identifying the subject of a statement that is imposed under the present law while at the same time it would make it more logical to take these steps. While research and inquiry to determine accuracy and truth is good practice, exhaustive research to determine some hidden and improbable meaning can be considered to be an unwarranted exercise. For instance, checking the identity and identification of an individual charged with a criminal offence ensures that inaccurate and harmful information will not be circulated; checking to ensure that there is not another individual with the same or a similar name, or another individual with a different identity living at the same address goes beyond justifiable inquiry to verification of speculative assumptions. These steps while minimizing the risk of a defamatory suit under the present law are in fact irrelevant to whether liability issues.[448]

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448 See Chapter II, pages 30-32 where it is argued that a possible result when liability is imposed regardless of fault is to take no steps to ensure accuracy since a party cannot rely on such efforts to avoid liability.

As well as promoting efficiency, this standard could be used in a flexible manner to adopt a better approach to critical comments directed at institutions or groups, and not intended to refer to any particular individual, which presently attract liability. Fault and the level of legal responsibility imposed could be made relative to the seriousness of the allegation and the size of the group. If the communication in question contains an allegation of gross misconduct, then it demands a more cautious approach and greater steps taken to ensure accuracy. On the other hand, if the comment is critical and general in nature, the same approach may not be warranted. In this manner, the issue of liability could be focused on the content of the communication rather than the mere fiction of whether someone has been 'directly hit'. With a more rational basis for liability and a more specific scope on what communications should attract legal responsibility, expression and the circulation of information can be accommodated and the value of reputation enhanced.

CHAPTER VI

If a coherent argument can be made for altering the law to minimize the negative effect of the present standard of liability, the question then arises as to what effect, if any, will the *Charter of Rights and Freedoms*[449] have on this issue. The *Charter*, like other constitutional documents, is a broad statement of fundamental principles.[450] The freedoms most relevant to defamatory doctrine and communication are set out in Section 2, which provides that "everyone" has freedom of "thought, belief, opinion and expression, including freedom of the press and other media of communication."[451] Unlike the American Constitution, the Canadian *Charter* has an inherent limiting and balancing structure. These rights and freedoms are not absolute but are subject to "such limitations as may be justifiable in a free and democratic society."[452] Therefore there is a very real possibility that even if the Charter is seen to apply to the private law of defamation, it may have no effect because the present strict standard of liability is "justifiable."[453] As a result, a stepped approach must be adopted: will the Charter be applicable to the common law action of defamation and if so, to what effect and in what manner should it effect the tort.

The leading decision to date on the application of the Charter is the judgment of the Supreme Court of Canada in *Dolphin Delivery Ltd. v. R. W. D. S. U., Local*

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449 Part 1 of the *Constitution Act, 1982*, as enacted by the *Canada Act, 1982* (U.K.), c.11, referred to hereinafter as the *Charter*.

450 As such, it can be argued that substantive content and argument must be brought to the *Charter* rather than this document providing any magical answers in and of itself.

451 *Supra.* , note 450.

452 *Supra.*, note 450, S.1

453 Whereas in "absolute" type constitutions, the question is simple---does it or does it not apply---the question must be answered in two steps in Canada: does the Charter apply and if it does apply, does it have any effect or impact.

580.[454] MacIntyre J., speaking on behalf of the court, pronounced broadly that the Charter of Rights as the supreme law of the land does apply to the common law[455] However, he qualified this broad statement by suggesting that it would apply only "insofar as the common law is the basis of some governmental action which, it is alleged, infringes a guaranteed right and freedom."[456] This obviously gives rise to the question what constitutes the necessary governmental action or connection that will invoke the application of the Charter. The court was more hesitant to determine this issue as it was not necessary to the case before them. Apologizing that it was "difficult and probably dangerous to define with narrow precision"[457], MacIntyre J. skated over the issue. Given its profound importance on what impact the Charter will have on much social activity and many common rights and obligations, this hesitancy is not surprising. It does though provide little clarity and certainty in what is an important area of the emerging law.

Some guidance can however be gleened from the actual decision in the *Dolphin Delivery* case and from several other comments, albeit *obiter*, made by MacIntyre J. The appellant labor union had argued before the Court that the injunction granted by the trial court judge to prevent secondary picketing was contrary to their constitutional right of freedom of expression and association. The injunction had been based on the 'right' of the respondent employer to gain a remedy for the threatened tort of inducement to breach contract. Therefore, a civil cause and a Charter right were, allegedly, in direct opposition. MacIntyre J. rejected this argument on the basis that the respondent and the appellant were both private parties and the matter concerned the enforcement by the respondent of a right that arose under the common law. The case was purely "private litigation"[458], and as a result, the governmental nexus or action necessary to warrant the invocation of the principles of the Charter was not present. This would appear to indicate that, at least, the Charter does not apply to litigation where both parties are

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454 [1986] 2 S.C.R. 573, 38 C.C.L.T. 184, 9 B.C.L.R. (2d) 273, [1987] 1 W.W.R. 577, 33 D.L.R. (4th) 174 (sub. nom. *Syndicat des Detaillants, Grossistes & Magasins a Rayons, Section Locale 580-c. Dolphin Delivery Ltd.*) (S.C.C.).

455 MacIntyre J. was of the view that s. 52 of the Charter, which provides that this constitution is the "supreme law" of the land and that "any law" that is inconsistent with the Charter is of no force and effect, must by the breadth of language used extend to the common law.

456 *Supra.*, note 455 at 599.

457 *Ibid.*

458 *Ibid.*

advancing or opposing a case solely on the basis of common law rights and where neither party is attempting to enforce or rely on a statutory enactment.[459] This view is further supported by MacIntyre J.'s lament that even if the Charter did not apply to the common law, common law rules should be applied and developed "in a manner consistent with the fundamental values enshrined in the Constitution."[460] Therefore, it would appear in certain contexts that the common law, absent some governmental connection, will not be affected by the application of the Charter.

But between this definite---private parties and the common law---and the extreme view rejected in the *Dolphin* case that all enforcement of common law rights is sanctioned by governmental action through either express or implied permission or by viewing the judiciary as falling within the definition of "government"[461], there are a variety of different potential interpretations of "governmental action". This issue turns on an interpretation of S.32(1) which provides, in summary, that the Charter shall apply to the various levels of legislative bodies and governments in respect of "all matters within their control." Leaving the greater constitutional policy issues and formal interpretational arguments aside,[462] "all matters within their control" could mean all matters that a governmental body or delegate have enacted legislation upon, that is the case where a party is specifically relying upon a legislated right to bring their action.[463] Or alternatively, it could mean an occasion where a broader area of law has been the subject of legislation and legislative review and, although neither party is expressly relying on a specific statutory provision, it affects the greater issues in the case. Or additionally, governmental action could mean an act by a governmental official as a party to private litigation in enforcing a common law right. Given the lack of specific direction set by MacIntyre J. in the *Dolphin Delivery* case, any one of these options are possible.

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459 This will undoubtedly result in pleaders trying to force their actions onto a statutory enactment in order to buttress a potential Charter argument.

460 *Ibid.*. at 603

461 This argument was expressly rejected in the *Dolphin Delivery*.

462 See for instance Gibson, "Tort Law and the Charter of Rights", (1987) Man. L.J. 1, "Distinguishing the Governors from the Governed: The Meaning of 'Government' under S.32(1) of the Charter" (1983) Man. L. J. 505; McLellan and Elman, "To Whom Does the Charter Apply? Some Recent Cases on s.32", (1986) 24 Alta. L.Rev. 361.

463 Support for this view can be found in the statement "In the case at bar, we have no offending statute...[there is no] exercise of or reliance on governmental action." *Supra.*, note 455 at 603, per MacIntyre J.:

The one case to date where this issue has arisen in the context of defamation is the decision of Richard J. of the Nova Scotia Supreme Court (Trial Division) in *Coates v. The Citizen et. al.* [464] This libel action was brought by Robert Coates, the former Defence Minister in the first Mulroney Cabinet, against an Ottawa newspaper for allegations published while he was the Defence Minister that a visit to a West German night club and brothel while on an official tour constituted a "security risk." The disclosure and circulation of this allegation and other pressures had resulted in the resignation of Coates from his Cabinet post. With the plaintiff a politician and public official, the defendant a newspaper commenting upon what was asserted to be a matter of public interest, and the communication a comment on fitness for office and the compromise of national security, the facts of the case were extremely appropriate for a review within the constitutional context.[465] Counsel for the defendant, The Citizen, advanced two arguments on an interlocutory application. Firstly, that certain provisions of the Nova Scotia Defamation Act, which constituted the basis of the plaintiff's cause of action, violated the freedom of expression guaranteed under section 2(1)(b) of the Charter and that, on this basis, their client should enjoy a 'constitutional privilege' similar to that established in the United States in the *New York Times Co. v. Sullivan* decision. Secondly, that the statutory codification of strict liability under the provincial Act, which placed the burden of proving truth on the defendant in a defamation action, was a violation of the right to liberty and corresponding presumption of innocence guaranteed under sections 7 and 11(b) of the Charter.

The court accepted with little analysis the defendant's proposition that certain provisions of the Nova Scotia *Defamation Act* [466] provided the sufficient governmental connection to allow the application of the Charter. Unfortunately, Richards J. did not have the benefit of hearing any counter-argument from counsel for the plaintiff who, for financial reasons, did not make any representations to the court. In his view, the statutory enactments in question, sections 8, 9, 21 and 22, either "adopted, modified, or preserved" the common law rules that gave rise to the presumptions of falsity,

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464 (1988) 44 C.C.L.T. 286.

465 The common law defences of fair comment and qualified privilege on grounds of public interest were clearly applicable as well to the case.

466 Nova Scotia, Defamation Act, R.S.N.S., 1967, c.72.

malice, and damage that were under attack as unconstitutional.[467] On this basis, this legislative intervention warranted review of the law under the principles of the Charter. On closer examination though, this broad statement and conclusion is puzzling. While the learned justice was correct that these statutory provisions, to a certain extent, do modify the common law, the specific reform implemented under these enactments was only in a very limited sense relevant to the common law presumptions asserted to be unconstitutional.

Sections 8 and 9 of the provincial Act, while they do modify the defences of fair comment and justification,[468] do so in a manner that does not affect the presumption of falsity.[469] These provisions only revise the anomaly that existed under the common law that a defendant could still fail in establishing these defences when he had proven the truth of the substantial facts underlying his allegation but had not proven the truth of every specific fact. They do not codify or approve in a direct manner the presumption of falsity and, at most, it can be said that they limit it and assist the defendant's case. Sections 21 and 22 only create a special right of retraction and apology that a newspaper or broadcasting defendant can rely on in certain instances to either mitigate damages or as a bar to the recovery of general damages. Only, in a very limited manner, can s.22 be seen to modify the common law presumption of damages by limiting the plaintiff when the defendant has followed the apology and retraction procedures to recovery only of special damages.[470] The presumption of damages though is unrelated to the common law rule of strict liability that the defendant was arguing was unconstitutional. Perhaps most significantly, it does not appear from the decision of Richard J. that either the defendant or the plaintiff were relying on any of these statutory provisions within their respective cases.

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467 *Supra.*, note 465 at 297.

468 Both section 8 and 9, *supra.*, note 20, extend the application of these defences to instances where not every fact placed in dispute was proved and thus provide some assistance to a defendant attempting to establish a sufficient factual truth or underlying truth of an opinion.

469 At the most, these provisions expand the scope of the defences.

470 Section. 20, *supra.*, note 468, although it poses lack of malice and lack of gross negligence as a criteria, only affects the issue of damages insofar as the statutory criteria set out are a prerequisite to the provision governing mitigation of damages. S. 21 does limit recovery of general damages which are presumed when the defendant establishes good faith, public benefit, an honest mistake and a published apology. This is the only manner in which these provisions can be said to effect the presumption of damages.

Nevertheless, Richards J. proceeded on the basis that by intervening into the area of defamatory law,the legislature of Nova Scotia had "acted" in the area, and the presence of legislation created the means by which the Charter would be invoked.[471] Rather than limiting his analysis then to the specific revision effected by this statutory reform, he determined that once invoked, the Charter had a wide application regardless of the basis upon which it was deemed to be applicable. Both the Act and the common law were amenable to Charter supervision[472] even though only some common law principles were subsumed in the Act.[473] In his view, this initial connection in effect opened the door up for a review of the entire common law. It would seem to follow under this view that, if a legislative body has intervened into any area of law, it may be deemed to have 'looked' at the law which subsequently becomes colored and subject to review in its entirety. In a curious application of the "governmental action" criteria set out by MacIntyre J. in the *Dolphin Delivery* case, the learned justice had reached a conclusion whereby the entire common law was subject to review in a matter that he had originally determined was "one in a category of a disputes between private parties."[474]

In any event at the end of the day, Richards J. was of the view that the Charter had no effect on present defamatory doctrine. "Allowing for the moment that the laws of defamation in Nova Scotia [do] impose a serious limitation on freedom of the expression of the media",[475] he concluded that such a restriction was justified as it provided the proper balance in protecting personal reputation from false allegations of fact. In doing so, he rejected the defendant's argument that the present standard of liability deterred open communication and the notion that a constitutional privilege should extend to all communications on matters of public concern. He also attached no significance to his determination that the plaintiff was a public official thereby ignoring, it would appear, any special rule of liability that would attach to public figures or

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471 This appears from the argument of defendant's counsel referred to by Allan Domes in "The Courts, The Common Law, and The Constitutional Imperative: Beyond Dolphin Delivery" 1989 Alta. L. R. 430 at 455

472 Richards J. did note that if he was wrong and the parties were relying on common law principles only, then the Charter had no application. *Supra.*, note 465 at 302

473 *Ibid.*, at 302.

474 *Ibid.*, at 301.

475 *Ibid.*, at 309. The court referred to "freedom of expression of media", failing to distinguish between the separate freedom of expression and freedom of the press.

issues.[476]. In addition, he did not accept the defendant's second argument that the presumption of malice and falsity within conventional doctrine constituted an unconstitutional reverse onus.[477] In effect, Richards J. relied on the conventional view that the present standard of liability maintains the correct neutral balance between protection of reputation and freedom of speech and transposed this common concept onto the balancing structure created by s.1 of the Charter. The court concluded that the present strict level of responsibility under the law of defamation in Canada was justifiable as it embodied the citizen's sole defence against "the awesome power of the printed word."

Despite the cursory analysis and the uncertain means by which he reached the conclusion that the Charter applied to the case before him, there is some merit in this approach. A restrictive view, based on specific reliance on a statutory provision, would mean that the constitution would have little application to the law of defamation. This body of law is in each Canadian province for the most part the creature of the common law. Legislative intervention has been minor. Review of the provincial acts[478] reveal six general matters that have been addressed by all provinces[479]:

> 1. Provision has been made for the introduction of an apology in mitigation of damages for all defendants and a retraction in mitigation of damages for newspaper or broadcasters.
> 2. The requirement for pleading particular allegations, which could be embarrassing, has been reduced and the jury has been entitled to direct a general verdict.
> 3. The fair report privilege of matters before public bodies has been defined.

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476 No significance was attached to this status as grounds for invoking the Charter.

477 The court did not dwell on this point. This decision can be applauded as the "reverse onus" provision and existing case law is based solely on matters of the criminal law. Strict liability in private law is based on private law considerations and should not be the subject of criminal law analogies.It would be extremely radical to suggest that all strict liability torts constituted an enfringement of this general presumption of innocence

478 Alberta, *Defamation Act*, R.S.A. 1970,c.D-6; British Columbia: *Libel and Slander Act*, R.S.B.C., c.234; Manitoba, *Defamation Act*, R.S.M., D-20; New Brunswick, *Defamation Act*, R.S.N.B., D-5; Newfoundland, *Defamation Act*, R.S.N., c.63; Nova Scotia, *Defamation Act*, R.S.N.S., 1967, c.72; Ontario: *Libel and Slander Act*, R.S.O., c.237; Prince Edward Island, *Defamation Act*, R.S.P.E.I. 1974, c.D-3; Saskatchewan:*Libel and Slander Act*, R.S.S., c.L-14.

479 Although most provincial statutes, apart from variance in wording and structure, are substantially similar being based on the reform proposed under the Uniform Defamation Act, 1962, not all provinces have opted to remove the distinction between slander actionable *per se* and actionable only on proof of damage.

4. Specific procedures have been established for actions against newspapers as to limitation dates, the place of trial, and a limitation on damages in the case of unintentional defamation when the matter was one of public benefit.
5.The defence of fair comment has been revised insofar as it will still be available for the defendant even if he did not hold the opinion himself.
6. The defences of truth and fair comment have been broadened through the provision that they will not fail if the defendant fails to establish all the facts of his statement and as long as he has established substantially all of these facts.

While these reforms have reduced the severity of several common law principles and clarified several issues within the defences, they have not instituted any fundamental change in the law. Although the presumption of falsity has been minimized by removing the strict approach brought to the defences of truth and fair comment, the strict standard of liability has not been affected except insofar as a limited defence of unintentional publication on matters of public benefit has been provided for newspapers or broadcasters which they can utilize to restrict damages but not liability.[480] Consequently, there is little provincial legislation, under a literal approach, which will provide a sound basis upon which to conduct Charter review.

It should be noted though that B.C., Ontario and Saskatchewan[481] have chosen to retain slander actionable only on proof of damage and Nova Scotia retain it but to rename it defamation,[482] while the other provinces have removed this anomaly from the common law. Even under a literal approach it is possible to argue that these other provinces have in effect created a new tort of defamation by revising the common law rule on damage in slander and that the whole common law is amenable to Charter review. However, a finding based on this argument would not apply to Ontario, British Columbia, Saskatchewan, and arguably Nova Scotia, who have not incorporated this revision. This result, a different body of law for different parts of the country, would not be satisfactory.

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480 While a newspaper defendant might rely on this provision to claim that an even less restrictive standard of liability should be imposed on them because of their specific status within these legislation and under the "freedom of the press" provision of s. 2(b) of the *Charter*.

481 See generally, British Columbia: *Libel and Slander Act*, R.S.B.C., c.234; Ontario: *Libel and Slander Act*, R.S.O., c.237; Saskatchewan:*Libel and Slander Act*, R.S.S., c.L-14;

482 Nova Scotia, *Defamation Act*, R.S.N.S., 1967, c.72, s. 1(b).

If the 'open approach' utilized by Richards J. in the *Coates* case is adopted it should result in a more satisfactory review of the common law. Since the legislature has intervened into the general area, the whole law should be subject to scrutiny. However, even under this approach, the reasoning and procedure is still restricted by the constitutional platform from which it arises. The alleged constitutional right abridged and whether such an abridgement is justifiable must be still followed. If we reflect back to the comment of MacIntyre in the *Dolphin Delivery* case, he stated that the common law should be developed "in a manner consistent with the fundamental values enshrined in the Constitution." It becomes apparent that the common law, regardless of whether the Charter is directly applied as a matter of pleading, should evolve in a manner that incorporates these principles. No matter what approach is adopted, no matter what form of legal reasoning is utilized, the principles set out in this constitutional instrument should still be respected. From a general point of view then, it should not really matter whether an open or restricted approach is adopted or whether private or public parties are involved, the rights embodied in the Charter should still be respected.

Richards J. adopted the view that the present law embodied the correct balance between protection of reputation and free speech within the law. It has been argued through the course of this paper that, while some benefit is derived from liability without fault, there are also significant detrimental effects. If the present law does incorporate the right balance between reputation and speech, then it also imposes on the entitlement to communicate in an open yet responsible manner, chills free speech and mutes the quality of information that is circulated. A true value is not attached to reputation because the law imposes restrictions on the open circulation of information. It is apparent on the face of the Charter that "freedom of thought, belief, expression, and opinion" are values to be pursued. With little effort of reasoning or logic, this provision can be interpreted literally to support the development and refinement of the defamatory criteria so that it truly respects the right of an individual to hold an opinion. While a false statement of fact may be "unjustifiable" pursuant to the s.1 balancing mechanism, a comment containing an opinion that does not impute a false fact and does not tend to cause harm should be permitted. If recognition is to be given to the importance of promoting open communication on ideas, events and people, some limitation should be imposed on the effect of the present strict standard of liability.

This can be achieved through limiting the ambit of sanctionable speech on the basis of both reason and the value set out squarely within s. 2(b).

It can also be argued that the present principle of liability without fault for any communication that refers in a defamatory manner to someone may also be inconsistent with this provision. When this rule results in liability for a generalized statement that was not directly aimed at an individual, it can also be seen to be an abridgment of the right to hold an opinion. A false statement of fact that directly and clearly hits an individual should not be permitted because of the damage caused to that individual. However, when the damage is caused only because of his participation in a larger group and the comment is made directly at the group, the damage may be abstracted as well. A standard of negligence which would still catch oblique and mischievous references but relieve liability in the case of the accidental reference and the generalized comment may be justifiable as a restriction on the impact of strict liability.

In conclusion, liability without fault in defamation is a fairly recent phenomenon which has been compounded by the broad ambit of what constitutes a defamatory comment. In order to fully protect the reputation of individuals and the quality of information circulated on important issues, it may be in order to preserve elements of this standard. However, its impact can be minimized through the restriction on what constitutes an actionable statement. While real damage can be caused by false statements of fact, opinions do not cause the same type of harm. With the application, either direct or indirect, of the principles embodied in the Charter of Rights and Freedoms, it is hoped that real value will be attached to freedom of opinion, the defamatory criteria restricted, the negative impact of strict liability minimized and communications in the appropriate form encouraged.

BIBLIOGRAPHY - BOOKS

Baker, D. *An Introduction to English Legal History* (2nd.ed., 1979).

Barron, J.A. and Dienes, T.C., *Handbook of Free Speech and Free Press* (1979).

Brown, R. E. *The Law of Defamation in Canada* (Volumes 1 and 2 1987).

Carter-Ruck on Libel and Slander (3rd ed. 1985), ed. by Peter Carter-Ruck and R. Walker.

Duncan & Neill on Defamation (2nd ed. 1983), ed. by Sir Brian Neill and Richard Rampton.

Fleming, J. *The Law of Torts* (7th ed., 1987).

Gatley on Libel and Slander (8th ed. 1981) ed. by Philip Lewis.

Harper and James *The Law of Torts* (1956).

Holdsworth, W. *The History of English Law* (3rd ed., 1945).

Kiralfy, *Historical Sources of the Common Law* (1952).

Linden, A. *Canadian Tort Law* (4th ed., 1988).

Milsom, S.F.C. *Historical Foundations of the Common Law* (2nd ed., 1981).

Plucknett, T. *A Concise History of the Common Law* (5th ed., 1956)

Pollock and Maitland, *History of the English Law* (2nd. ed., 1968).

Porter and Potts, *Canadian Libel Practice* (1985).

Selden Society: Select Cases on the Law of Defamation to 1600, Vol.101, ed. by R.H. Helmholtz.

Starkie, T. *A Treatise on the Law of Libel and Slander* (2nd. ed., 1830).

Weir, T. *Casebook on Torts* (1982).

Williams, J. *The Law of Defamation* (2nd. ed., 1988).

Wright, C. and Linden, A. *Canadian Tort Law: Cases, Notes and Materials* (7th ed., 1980).

BIBLIOGRAPHY - ARTICLES

Anderson, "Libel and Press Self-Censorship", (1975) 53 Texas L. Rev. 422.

Becht, "The Absolute Privilege of the Executive in Defamation", (1962) 15 Vand. L. Rev. 1127.

Beckton, "Freedom of the Press in Canada: Prior Restraints" in *The Media, The Courts and the Charter* (1986) 119.

Cane, "Justice and Justification for Tort Liability", (1982) Oxf. Journ. of Leg. Stud. 30.

Carr, "The English Law of Defamation", (1902) 18 L.Q.R. 255, 388.

Davis, "Parliamentary Broadcasting and the Law of Defamation", (1947-48) 7 U.T.L.J. 385.

Donnely, ""The History of Defamation", (1949) Wisc. L. Rev. 99.

Doody, "Freedom of the Press, The Canadian Charter of Rights and Freedoms, and A New Category of Qualified Privilege", (1983) 61 Can. Bar Rev. 124.

Eldredge, "The Spurious Rule of Libel *Per Quod*", (1966), 79 Harv. L. Rev. 733.

Fisher, "A Chapter in the History of the Law of Libel", (1894) 10 L.Q.R. 158.

Fleming, "Retraction and Reply: Alternative Remedies in Defamation", (1978) 12 U.B.C. L. R. 15.

Gibson, "Common Law Privacy" in *Studies in Canadian Tort Law* (1977), 343.

Gibson, "Tort Law and the Charter of Rights", (1987) Man. L.J. 1.

Gibson, "Distinguishing the Governors from the Governed: The Meaning of 'Government' under S.32(1) of the Charter", (1983) Man. L. J. 505.

Gregory, "Trespass to Negligence to Absolute Liability", (1951) 37 Va. L. Rev. 359.

Hanford, "Tort Liability for Threatening or Insulting Words", (1976) 54 Can. B. Rev. 576.

Harnet and Thornton, "The Truth Hurts: A Critique of a Defence to Defamation", (1949), 35 Va. L. Rev. 425.

Harper, "Ethical Basis of the Law of Defamation", (1926-27) 31 Dick. L. Rev. 63.

Hemholtz, "Canonical Defamation in Medieval England", (1971) 15 American Journ. of Leg. Hist. 255.

Helmholtz, "Civil Trials and the Limits of Responsible Speech" in *Juries, Libel and Justice: The Role of English Juires in 17th and 18th Century Trials for Libel and Slander* (1984).

Holmes, "Privilege, Malice and Intent" in *Selected Essays in the Law of Torts* (1924), 162.

Klar, "Developments in Tort Law", (1980) 1 S. C. Law Rev. 312.

Klar, "The Defence of Fair Comment", 8 C. C. L. T. 149.

Leflar, "Radio or Television Defamation: Fault or Strict Liability", (1954) 15 Ohio State L. J. 252.

Lovell, "The Reception of Defamation by the Common Law", (1962) 15 Vanderbilt L. R. 1051.

Kaye, "Libel and Slander - Two Torts or One?" (1975) 91 L. Q. R. 524.

Keeton, "Defamation and Freedom of the Press", (1976) 54 Texas L. Rev. 1220.

MacLaren, "Defamation and Municipal Politics", (1980) 29 U. New Brunsw. L. Rev. 123.

Madott, "Libel Law, Fiction, and the Charter", (1983) 21 Osgoode Hall L. J. 741.

Malone, "Ruminations on the Role of Fault in the History of the Common Law", (1970-71) 31 Louisiana L. Rev. 1.

Martin, "Interlocutory Injunctions in Libel", (1982) 20 U. West. Ont. L. Rev. 129.

Martin, "Defamation - The Relation of Negligence to Liability", (1939) 13 Austr. L. J. 217.

McLellan and Elman, "To Whom Does the Charter Apply: Some Recent Cases on Section 32", (1986) 70 Alta. L. Rev. 361.

Note, (1956) 69 Harv. L. Rev. 877.

Phillips, "Is Lunacy a Defence in Libel and Slander Actions?", (1929) 3 Austr. L. J. 3.

Probert, "Defamation, A Camouflage of Psychic Interests: The Beginning of a Behavioral Analysis", (1961-62), 15 Vand. L. Rev. 1173.

Prosser, "Libel *Per Quod*", (1966) 46 Virg. L. Rev. 839.

Ray, "Truth: A Defence to Libel", (1931) 16 Minn. L. Rev. 43.

Roberts, "Negligence: Blackstove to Shaw to ? An Intellectual Escapade in a Tory Vein", (1964-65) 50 Cornell L. Q. 191.

Robertson, "Defamation & the First Amendment: In Praise of *Gertz v. Robert Welch. Inc.*", (1975-76) 54 Tex. L. Rev. 199.

Smith, "Jones v. Hulton: Three Conflicting Judicial Views as to Defamation", (1912) 60 U. Penn. L. Rev. 365.

Symmons, "New Remedies against Libellers of the Dead", (1980) 18 U. West. Ont. L. Rev. 521.

Titus, "Statement of Fact Versus Statement of Opinion: A Spurious Dispute in Fair Comment", (1962), 15 Vanderbilt L. R. 1205.

Veeder, "The History of the Common Law of Defamation", (1903) 3 Col. L.R. 546, (1904) 4 Col. L.R. 25.

Wade, "Tort Liability for Abusive and Insulting Laguage", (1950-51) 4 Vand. L. Rev. 63.

Wade, "Defamation and the Right of Privacy", (1961-62) 15 Vand. L. Rev. 1093.

Weiler, "Defamation, Enterprise Liability, and Free Speech" (1967) 17 U. T. L. J. 278.

Wigmore, "Responsibility for Tortious Acts", (1894) 7 Harv. L. Rev. 315.

Williams, "Decorum in Defamation" in *Studies in Canadian Tort Law* (1977), 273.

Wilson, "The Law of Libel and the Art of Fiction", (1981) 44 Law & Cont. Problems 25.

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